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No. _____

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1996

CITY OF SAN JUAN, TEXAS, Petitioner

V.

NORTH ALAMO WATER SUPPLY CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE PROVISIONS OF 7 U.S.C. § 1926(b) ARE ENFORCEABLE AGAINST THE CITY OF SAN JUAN OR THE STATE OF TEXAS UNDER THE "CONDITIONAL SPENDING" TEST ADOPTED BY THIS COURT IN SOUTH DAKOTA v. DOLE, 483 U.S. 203 (1987)?

2. WHETHER THE PROVISIONS OF 7 U.S.C. § 1926(b), AS APPLIED BY THE MAGISTRATE AND AFFIRMED BY THE COURT OF APPEALS, MAY BE UPHELD AS A PROPER EXERCISE OF POWER BY CONGRESS UNDER THE SPENDING CLAUSE TO THE U.S. CONSTITUTION?

3. WHETHER CONGRESS CLEARLY AND MANIFESTLY DECLARED AN INTENT TO IMMUNIZE FEDERALLY-INDEBTED CORPORATIONS UNDER 7 U.S.C. §1926(a) FROM THE REACH OF TEXAS WATER CODE §§ 13.254 AND 13.255?

NAMES OF ALL PARTIES TO THE PROCEEDINGS

City of San Juan, Texas

North Alamo Water Supply Corporation

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OPINIONS BELOW

The opinion of the U.S. District Court delivered in this case is not published. The opinion of the U.S. Court of Appeals for the Fifth Circuit has been ordered for publication. The text of both opinions is found in the Appendix to this petition.

STATEMENT OF JURISDICTION

This is a petition for writ of certiorari from a judgment entered by the Fifth Circuit Court of Appeals on April 15, 1996. Petitioner timely filed a motion for rehearing, and this motion was denied on June 3, 1996. No requests for extension of time in which to file this petition for writ of certiorari have been made by the Petitioner. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1) (1995).

28 U.S.C. § 2403(a) may apply. Neither the United States Court of Appeals for the Fifth Circuit Court, nor the United States District Court for the Southern District of Texas, McAllen Division, below certified to the Attorney General of the United States the fact that the constitutionality of an act of Congress was drawn into question. This document shall be served on the Solicitor General of the United States, in accordance with Rule 29.4(b).

U.S. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. Const., art. I, § 8, cl.1
2. U.S. Const., art. I, §8, cl.18
3. 7 U.S.C. § 1926(b)

(Verbatim text of the constitutional provisions and statutes is contained in Appendix F)

STATEMENT OF THE CASE

Defendant, San Juan, a Texas municipality, has been permanently enjoined by final judgment of the district court prohibiting Defendant, in part, from applying to the Texas Natural Resources Conservation Commission (the "Commission") to decertify the Plaintiff, North Alamo Water Supply Corporation ("North Alamo"), from a portion of the water service area granted under its certificate of convenience and necessity (the "CCN"). The issues relate to whether the permanent injunction is sustainable on the basis that 7 U.S.C. § 1926(b) preempts state law or is a "conditional spending" enactment pursuant to the Court's four-part test. South Dakota v. Dole, 483 U.S. 203 (1987).

1. Proceedings At The District Court

San Juan filed applications with the Commission under §§ 13.254 and 13.255 of the Texas Water Code seeking to decertify North Alamo from serving the area. In response, North Alamo filed a complaint in the District Court for the Southern District of Texas (McAllen Division) pursuant to 7 U.S.C. § 1926(b) seeking, in part, to enjoin San Juan from continuing to provide water services to the area and from pursuing its applications to the Commission.

In a separate administrative proceeding, San Juan has been enjoined pursuant to § 13.252 of the Texas Water Code from serving five subdivisions within North Alamo's CCN Area. See Tex. Nat. Res. Conserv. Comm'n, Order Granting the Petition of North Alamo Water Supply Corp. for a Cease and Desist Action against the City of San Juan. Docket No. 95-0599-UCR, slip op. (May 30, 1995); appeal docketed, No. 03-96-00219-CV, City of San Juan v. Tex. Nat. Res. Conserv. Comm'n and North Alamo Water Supply Corp. (Tex. App.--

Austin). [hereinafter "State Cease and Desist Order"].

On February 22, 1994, the case proceeded to trial before a magistrate by agreement of the parties pursuant to 28 U.S.C. § 636(c). The magistrate denied San Juan's Rule 12(b)(6) Motion To Dismiss For Failure to State A Cause of Action, see Motion To Dismiss For Failure to State a Claim Upon Which Relief Can Be Granted, February 22, 1994, North Alamo Water Supply Corp. v. City of San Juan, Tex., No. M-93-265 (S.D.--Texas) and Rule 19 Motions To Dismiss for Failure To Join The Farmers Home Administration ("FmHA") and the Texas Natural Resources Conservation Commission as Necessary and Indispensable Parties. See Defendant's Supp. Memo. of Authorities in Support of its Motion to Join the FmHA as Additional Plaintiff, and Alternative Motion to Dismiss for Failure to Join an Indispensable Party, dated July 22, 1994, North Alamo Water Supply Corp. v. City of San Juan, Tex., No. M-93-265 (S.D.--Texas) [hereinafter Def. Supp. Memo.]. On May 15, 1995 the magistrate entered final judgment. It ordered San Juan to cease providing service to the area; to turn over the water infrastructure in the area it was serving to North Alamo, and to recall its two applications to the Commission. The magistrate denied San Juan's Post-Judgment Rule 59(c) Motion for a New Trial; See Defendant's Motion for a New Trial, December 27, 1994, North Alamo Water Supply Corp. v. City of San Juan, Tex., Civil Action No. M-93-265 and Rule 59(e) Motion To Amend The Judgment on grounds that 7 U.S.C. § 1926(b) (the "Act") did not apply and that Plaintiff had failed in its burden of proof under the Act. See. Defendant's Motion To Alter or Amend the Judgment, December 27, 1994, North Alamo Water Supply Corp. v. City of San Juan, Tex., Civil Action No. M-93-265.

2. Appeal to the Fifth Circuit Court of Appeals

San Juan appealed to the Fifth Circuit Court of Appeals on numerous issues. The Fifth Circuit Court of Appeals upheld the District Court's judgment, but remanded in part for a determination of the value of, and compensation for, any property which the City owned in the transferred infrastructure. The Court declined to consider San Juan's challenge that the provisions of the Act were not enforceable against San Juan or the State of Texas pursuant to the "conditional spending" test adopted by this Court in South Dakota v. Dole, 483 U.S. 203 (1987). It also declined to consider San Juan's challenge to the District Court's opinion that the applications to the Commission by San Juan were preempted by 7 U.S.C. § 1926(b). Finally, the court held that the State Cease and Desist Order rendered moot San Juan's challenge to the federal prohibition against initiating administrative proceedings. San Juan contended that as applied by the magistrate, the provisions of the Act could not be upheld as a proper exercise of power by Congress under the Spending Clause to the U.S. Constitution.

The State Cease and Desist Order covered a separate legal issue. The Commission took jurisdiction only under § 13.252 of the Water Code. See State Cease and Desist Order at 1. The Commission was unable to consider San Juan's application under §§ 13.254 and 13.255 of the Water Code because in obedience to the magistrate's injunction, San Juan asked the Commission to abate that consideration. The §§ 13.254 and 13.255 applications are still pending. See. Tex. Nat. Res. Conserv. Comm'n, In the Matter of the Applications for the City of San Juan, North Alamo Water Supply Corp. and Military Highway Water Supply Corp. (North Alamo Water Supply Corp. v. City of San Juan, Texas) Docket No. 9902-C (May 30, 1995).

The Court of Appeals correctly states that San Juan did not raise the constitutionality of 7 U.S.C. § 1926(b) at trial. But in its Rule 19(b) Motion To Join FmHA As An Indispensable Party, San Juan called the magistrate's attention to the source of 7 U.S.C. §1926(b) as Congressional power under the Spending Clause and the need to join the federal and state governments as indispensable parties to the action. See Def. Supp. Memo.

The Court of Appeals order was entered April 15, 1996. San Juan's subsequent motion for rehearing was denied on June 3, 1996. City of San Juan, Tex. v. North Alamo Water Supply Corp., No. 95-40048, slip op. (5th Cir. April 15, 1996).

ARGUMENT

At issue is the reach of Congress' authority invoking federal power solely pursuant to the Spending Clause, when Congress enacts substantive prohibitions on state legislative functions which have been historically recognized as traditional core state functions. U.S. CONST. art. I, § 8, cl.1.

THE PROVISIONS OF 7 U.S.C. § 1926(b) ARE NOT ENFORCEABLE AGAINST THE CITY OF SAN JUAN OR THE STATE OF TEXAS UNDER THE "CONDITIONAL SPENDING" TEST ADOPTED BY THIS COURT IN SOUTH DAKOTA v. DOLE, 483 U.S. 203 (1987).

The Court has adopted a four-part test for determining the applicability and enforceability against a state of substantive conditions attached to federal spending legislation. South Dakota v. Dole, 483 U.S. 203 (1987); Accord New York v. United States, 112 S.Ct. 2408 (1992); see also Pennhurst State

School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). San Juan has contended below that two requirements of the Court's test have not been satisfied in 7 U.S.C. § 1926(b) (the "Act") to allow enforcement of the Act against San Juan or to preempt provisions of State law. First, the federal law must "clearly and unambiguously" set forth the conditions which must be agreed to for receipt of federal funds. New York, 112 S.Ct. at 2423; Pennhurst, 451 U.S. at 17. Second, the state must "knowingly and voluntarily" accept the conditions imposed by the federal spending law. New York,112 S.Ct. at 2423; Pennhurst, 451 U.S. at 17. It must have the option to refuse to participate in the program. Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

The Act is not set out in a prototypical "conditional spending" format. Quite the contrary, it purports to displace state law *directly*. Further, North Alamo is neither a political entity nor agent of the state of Texas. See Tarrant County Water Supply Corp. v. Hurst-Eules-Bedford Indep. School Dist., 391 S.W.2d 162, 163 (Tex. App.--Ft. Worth 1965, n.r.e.); TEX. REV. CIV. STAT. ANN. art. 1434a §5 (Vernon 1980). Therefore, the acceptance of the FmHA funds by North Alamo is not, as a matter of law, acceptance of these funds by Texas or San Juan under any legal theory which has been approved by this Court. As noted, Petitioner did not challenge the constitutionality of the federal law at trial in the same posture as it did at the Court of Appeals. But Petitioner has pointed out to the Court that the federal law is not constitutionally obnoxious *ab initio*. One of the arguments made below by Petitioner regarding the Act was that "for its regulatory provisions to apply, the State of Texas had to "voluntarily and knowingly" accept its benefits and restrictions." See Brief for the City of San Juan, Texas, North Alamo Water Supply Corp. vs. City of San Juan, No. 95-40048. This is not a challenge to the constitutionality of the Act. It is a point of

error of law.

THE PROVISIONS OF 7 U.S.C. § 1926(b), AS APPLIED BY THE MAGISTRATE AND AFFIRMED BY THE COURT OF APPEALS, MAY NOT BE UPHELD AS A PROPER EXERCISE OF POWER BY CONGRESS UNDER THE SPENDING CLAUSE TO THE U.S. CONSTITUTION.

The "conditional spending" doctrine is well-settled. See, e.g., Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981), South Dakota v. Dole, 483 U.S. 203 (1987), and New York v. United States, 112 S.Ct. 2408 (1992). Under that doctrine, Congress' power to require a state to comply with a federal law is enforceable under general contract principles. Hence, in review of "conditional spending" cases, there is no need for preemption analysis. See Pennhurst, 451 U.S. at 17. Rather, the function of the judiciary is to determine whether "the state voluntarily and knowingly accepted the terms of the contract". Pennhurst, 451 U.S. at 17. If it did, the conditions attach. If the state fails to adhere to the conditions, it loses the federal funding. Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947); Compare United States Dep't of Transp. v. Paralyzed Veterans of America, 477 U.S. 597, 605 (1986). The Fifth Circuit disregards this approach in its analysis below.

Every court that has interpreted 7 U.S.C. § 1926(b) has concluded that the Act invokes only the spending power of Congress. See, e.g., City of Madison, Miss. v. Bear Creek Water Ass'n, Inc. 816 F.2d 1057 (5th Cir. 1987), Glenpool Utility Services Auth. v. Creek County Rural Water Dist. No. 2, 861 F.2d 1211, 1215 (10th Cir. 1988), and San Juan, No.95-40048 slip op. (5th Cir. April 15, 1996).Yet, only one of the courts of appeals has applied this Court's "conditional spending"

standard of review in passing on the Act's applicability. Glenpool Utility Services Auth. v. Creek County Rural Water Dist. No. 2, 861 F.2d 1211, 1215 (10th Cir. 1988).

Petitioner urged the court below to apply the Glenpool "conditional spending" interpretation. The Tenth Circuit Court of Appeals does not rely on federal preemption to arrive at the Act's applicability. Glenpool views 7 U.S.C. § 1926(b) as "conditional spending" legislation. Glenpool, 861 F.2d at 1216. It therefore applies the Act's specific prohibitions to the State and the encroaching City on a contractual basis:

> In so borrowing, Oklahoma -- through its authorized entity, District No. 2 -- bound itself and all of its subdivisions including the City of Glenpool, to the conditions it had accepted.

Glenpool, 861 F.2d 1216. Petitioner contends that Glenpool applies the correct legal standard of review, but disagrees that it correctly applied the Act under the facts presented.

The Fifth Circuit currently follows its precedent-setting case-Bear Creek. In Bear Creek, the Fifth Circuit held that § 1926(b) preempted the state's power of eminent domain:

> When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield.

Bear Creek, 816 F.2d at 1061 (citing Helvering v. Davis, 301 U.S. 619, 645, 57 S.Ct. 904, 910 (1937)).

Helvering does not support the Fifth Circuit's tenet that the Spending Clause authorizes Congress to directly and

substantively legislate in matters extraneous to its enumerated powers without regard to traditional core state functions. In Helvering, Justice Cardozo noted two elements of the Social Security Act which made it "conditional" rather than coercive: 1) the tax credit was approved by the state and could not be a law without it, and 2) the state had the discretion to repeal the unemployment law. Helvering, 301 U.S. at 592-93. Congress may not use *any* means as an exercise of the Necessary and Proper Clause as an adjunct to the Spending Clause to reach an unenumerated matter. See,e.g., Pennhurst, 451 U.S. at 17. See Engdahl, The Spending Power, 44 DUKE L. J. 1, 20 (1944); Yet, this is the construct under which the opinions of the district court and courts of appeals below are grounded.

The Fifth Circuit contends that "[t]he service area of a federally-indebted water association is sacrosanct: "[e]very federal court to have interpreted §1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment." See San Juan, No. 95-40048 slip op. at 10 (5th Cir. April 15, 1996). The Fifth Circuit has previously indicated, however, that whether federal law requires the people of Texas or San Juan to yield to a federally-imposed sacrosanctity may not depend on preemption analysis, but on the type of review urged by San Juan. See United States v. Lopez, 2 F.3d 1342, 1367 (5th Cir. 1993). In Lopez, the federal government argued to the Court that because the federal government had invested thousands of dollars in the San Antonio Independent School District, "the federal government is entitled to [directly] protect its investment in education." Hence, the court should enforce the Gun-Free Zone Schools Act. Lopez, 2 F.3d at 1342 n.50. The Court rejected the contention:

> "Although Congress may attach conditions to the receipt of federal funds, it must do so unambiguously."

Lopez, 2 F.3d at 1342 n.50. See Van Alstyne, Federalism, Congress, The States And The Tenth Amendment: Adrift In The Cellophane Sea. 5 DUKE L. J., 769, 771-772 (1987).

Where there has been no showing of a knowing acceptance by the City or the State of Texas of any federal funds whose receipt is conditioned on compliance with § 1926(b), there can be no finding that the Act applies as found by the Court below.

CONGRESS DID NOT CLEARLY AND MANIFESTLY DECLARE AN INTENT TO IMMUNIZE FEDERALLY-INDEBTED CORPORATIONS UNDER 7 U.S.C. § 1926(a) FROM THE REACH OF TEXAS WATER CODE §§ 13.254 AND 13.255.

This Court has found instrumentalities of the federal government immune from the reach of state law in two instances. Congress may expressly provide specific immunity to instrumentalities it creates. Pittman v. Home Owner's Loan Corp., 308 U.S. 21, 31 (1939). Likewise, the activities of a corporation through which the national government acts are "governmental functions and entitled to whatever immunity attaches to those functions when performed by the [federal] government itself through its departments." McCulloch v. Maryland, 4 Wheat. 316, 421,422 (1819). The power to create implies the power to protect. Id. This Congressional power to immunize federal instrumentalities from the reach of state law derives from the Necessary and Proper Clause of the U. S. CONST., art. I, §. 8, cl. 18; Pittman, 308 U.S. at 33.

The trial court's judgment immunizes North Alamo from regulation by the State pursuant to §§ 13.254 and 13.255 of

the Texas Water Code. The indebted-utility shall now decide if and when it wishes to provide service within its state-issued CCN, and when others may be allowed to do so. The judgment provides: "San Juan shall not offer to provide water services...within North Alamo's service area...except by North Alamo's written agreement or release." North Alamo v. City of San Juan, No. M-93-265 at 2-3 (S.D.--Tex.), Dec. 14, 1994 (not designated for pub.) Every federal district court in Texas is now obligated to grant summary judgment on the motion of an indebted-utility to any purported "curtailment" of its CCN service area by a municipality.

The plain import of that order is that the provisions of the Texas Water Code which govern the award of CCNs, as well as their regulation, have been preempted. But the most perplexing effect of the order is that North Alamo (as opposed to FmHA or the federal government) holds the discretion to allow a change in the state-issued CCN. The only realistically conceivable grounds for the Court's holding is that by enactment of 7 U.S.C. § 1926(b) Congress intended to protect indebted corporations as its own instrumentalities. However, nothing in the Act authorizes these corporations immunity because they perform federal governmental functions.

Perplexing as well is the fact that the directors of the corporation are private individuals elected by members of the corporation. TEX. REV. CIV. STAT. ANN. art. 1434a § 5 (Vernon 1980). Membership is voluntary and a member need not be a resident of the state or a United States citizen. Id.

The trial court's rationale for immunizing the North Alamo is grounded on Bear Creek's view that Congress desired to protect the federal interest in getting paid the loan. It reasoned that to accomplish this, Congress wanted to protect the so-called "service area" from outside competitors who might

draw away customers. Bear Creek, 816 F. 2d at 1059. If that competition occurred, it might impact on the indebted-corporation's ability to pay the loan. Further, any competition with the indebted utility might siphon funds which might be available to pay the loan. Since under state law North Alamo is required to provide service to all parts of its CCN or lose the CCN, then if it loses any portion of that CCN area, it may lose customers, which will affect the revenue base to pay back the loan.; See North Alamo v. City of San Juan, No. M-93-265 (S.D.--Tex) Dec. 14, 1994 at 7-15 [(citing Bear Creek, 816 F. 2d at 1059); see Glenpool Utility Services Auth. v. Creek County Rural Water Dist. No. 2, 861 F .2d 1211, 1214 (10th Cir. 1988), cert. denied 490 U.S. 1067 (1989)]. Hence, to avoid even the most insignificant risk that any of the above would occur, the trial court opined that even action by the Commission may be preempted:

> Although not raised by the parties, these circumstances suggest the possibility that § 1926(b) preempts the state administrative procedure invoked by San Juan [to obtain certification under §§ 13.254 or 13.255 of the Water Code]...because it frustrate[s] the purpose of the federal statute.

North Alamo, No. M-93-265 at 20, n.12; see also Jennings Water, Inc. v. City of North Vernon, Ind., 682 F. Supp. 421 (S.D. Ind. 1988), aff'd, 895 F. 2d 311 (7th Cir. 1989); North Shelby Water Co. v. Shelbyville Mun. Water & Sewer Comm'n, 803 F. Supp. 15 (E.D. Ky. 1992).

The magistrate had no discretion but to follow a preemption analysis consistent with Bear Creek. San Juan has argued below that this constituted an error of law. The Court of Appeals, however, hedged on this point, stating:

> It would have been more prudent to limit the injunction to the disputed areas, the particular portion of the Utility's service area at the heart of the litigation. As the Commission was not a party to this litigation, we assume the district court intended to limit this injunction only to the parties...[.] Such an injunction, purporting to control the actions of the Commission, a state regulatory body, would create a considerably more difficult federalism question: Namely, does § 1926(b) also preclude a state regulatory agency from modifying the service area of a federally indebted utility. But we leave that issue for another day.

San Juan, No. 95-40048, slip op. at 16 (5th Cir. April 15, 1996).

While there is a factual difference between enjoining San Juan from applying to decertify North Alamo and enjoining the Commission from turning over certification to San Juan, the distinction is fictional since the legal consequences are the same. First, the action by San Juan is an exercise of state power just as much as the Commission's is. Compare Rust v. Johnson, 597 F. 2d. 174, 177 (9th Cir. 1979). Second, under the Texas Water Code, the modification of North Alamo's "service area" is being accomplished because the legislature has enacted a law which requires that. See TEX. WATER CODE ANN. §§ 13.254 and 13.255 (Vernon 1995).

Finally, the judgment below signals to lower courts everywhere to take a deferential view when considering the displacement effect of federal spending laws on state law. While couched in terms of a limited preemption of predatory acts by municipalities, the judgment below makes limitless the means by which Congress may directly preempt state law by relying on the Spending Clause. This Court has never sanctioned the use of **any means whatsoever** as legitimate under the Spending Clause

to displace state law.

REASONS FOR GRANTING THE WRIT

1. 7 U.S.C. § 1926(b): Preemption vs. "Conditional Spending"

Petitioner requests the Court to grant writ to resolve the issues which are raised by the judgments of the courts below. The Court's resolution of these issues will resolve the question of whether the provisions of 7 U.S.C. § 1926(b) apply to the States as "conditions" imposed pursuant to the Spending Clause or as direct law via preemption regulating the states as states.

2. Reconcile or Resolve Disputes in Fifth and Tenth Circuits.

Petitioner has pointed out how the Fifth Circuit Court of Appeals in Bear Creek and San Juan has declined any meaningful role in determining the scope of congressional intent in the Act on the basis of "conditional spending." The panel defers to a supremacy analysis. On the other hand, the Tenth Circuit in Glenpool does apply this Court's "conditional spending" test. Is one of the circuits in error? If so, while the error may lie only in the process of review by the Courts, its effect may be to attribute to Congress certain powers which Congress did not intend to exercise or which the Constitution does not give to Congress, and which this court has never sanctioned.

There are very good reasons why the courts below intuitively defer to a preemption analysis. In 7 U.S.C. §1926(b), we do not find "conditional spending" legislation in the typical sense. The lines are "blurred" indeed. There is no challenge by

the States of a federal cut-back in funds for highways as there was in Dole, 483 U.S. at 2030. There is no Solicitor General representing federal interests. See Pennhurst, 451 U.S. at 24. In fact quite the opposite has occurred in this case. Petitioner's pre-trial motion to dismiss on the basis that the State of Texas and the FmHA were indispensable parties was rejected summarily.

If the federal Act is enacted pursuant to the Spending Clause it is unimagineable that the contracting parties are not even litigants. But how else can there be knowing "acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it." Pennhurst, 451 U.S. at 17.

3. The "Plain Meaning Rule"

Beyond addressing immediate issues which this case presents, the Court should grant writ to consider whether the Court should extend the use of the "plain meaning rule" adopted by this Court in Gregory v. Ashcroft to "conditional spending" legislation promulgated pursuant to the Spending Clause. Gregory v. Ashcroft, 501 U.S. 452,462, (1991). (adopting the "plain meaning rule").

During its most recent terms, the Court has questioned the propriety of its traditional deferential standard of review when Congress purports to legislate over those matters recognized historically as core state functions. Id. Reliance on the "plain meaning rule" has served as a meaningful procedural counterbalance in gleaning the full import of legislation by Congressional use of the Commerce Clause. See, e.g., New York v. United States, 112 S.Ct. 2408 (1992); Gregory v. Ashcroft, 501 U.S. at 460.

The Court has not been as anxious, however, to

reconsider the same deference it has traditionally given to Congressional use of the Spending Clause to impose federal policy on the states. Steward Machine Co. v. Davis, 301 U.S. 548 (1937). Yet, "conditional spending" legislation may raise similar, if not more substantial, political accountability concerns. The Court has acknowledged that the policy of offering "incentives" to the States in return for adoption of federal policy may become "coercive", and as such, unconstitutional. See South Dakota v. Dole, 483 U.S. 203, 211 (1987); see also New York v. United States, 112 S.Ct. 408 (1992); and Hoke, Constitutional Impediments To National Health Reform: Tenth Amendment And Spending Clause Hurdles, 21 HASTINGS CONST. L. Q. 89, 93 (1994).

The deference given congressional power in "conditional spending" cases is rational and is most fittingly relied on in those instances in which two things occur: 1) the federal monies flow into state coffers or the coffers of its political subdivisions, and, 2) the state legislature enacts the desired federal policy, or the state's authorized agencies incorporate federal policy into law. The "consent" element is clear and unmistakable: the State has voluntarily subjected itself to the terms of the contract. By further reliance on contract law metaphor, it may be said that the States can be held to "specific performance." Therefore, they should not be heard to complain once having availed themselves of the federal benefits. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 (1936).

There are conceivable occasions, however, in which deference will lose its rationality: 1) if the legal relationship between the States and the federal funds recipients is non-existent or far-removed; or 2) the federal "conditions" are mandatorily imposed rather than consented to.

While the focus of the "plain meaning rule" is on the

process of statutory interpretation, it serves two substantive purposes. First, its use may have the potential to hold all legislators directly accountable. For instance, neither San Juan nor North Alamo can purport to represent the critical federal and state interests that are at stake in this litigation. But because the lines of accountability have been blurred, so have the identity and interests of the real parties.

Second, left with the clear guidance which the "plain meaning rule" provides for statutory interpretation, the Courts may not instinctively decline *any* statutory review to determine Congressional intent consistent with the legitimate reach of Congressional power under the Spending Clause. By relying on the rule, nonetheless, all Courts must still enforce the unequivocal, expressed, congressional declaration of intent to displace traditional core state functions.

CONCLUSION

For the reasons advanced and for the further reason that this Court has not decided the scope of the 7 U.S.C. § 1926(b), this petition for certiorari should be granted.

Respectfully submitted,
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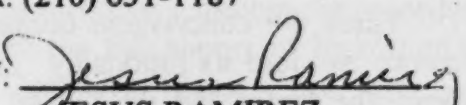
BY: 
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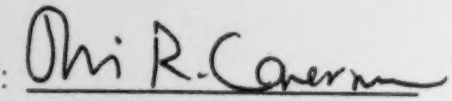
BY: 

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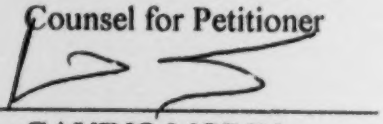
BY: 

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Counsel for Petitioner

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1996

CITY OF SAN JUAN, TEXAS, Petitioner

V.

NORTH ALAMO WATER SUPPLY CORPORATION, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIXES

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43 pp

APPENDIX A

FIFTH CIRCUIT OPINION

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-40048

NORTH ALAMO WATER
SUPPLY CORPORATION,

Plaintiff-Appellee;
versus

CITY OF SAN JUAN,
Defendant-Appellant.

TEXAS RURAL WATER ASSOCIATION,

Amicus Curiae

Appeals from the United States District Court
For The Southern District of Texas

(93-CV-265)

Before KING, WIENER, and BENAVIDES, Circuit Judge:
PER CURIAM*:

This appeal involves a battle between Plaintiff-Appellee North Alamo Water Supply Company (Utility) and the Defendant-Appellant city of San Juan, Texas (City) over which one has the right to provide water service to five residential subdivisions (disputed areas) in or near the City. After the City began providing water service to the disputed areas, the Utility filed this suit, claiming that it had the exclusive right to provide water service to the disputed areas. The district court held in favor of the Utility and enjoined the City. The City appealed complaining inter alia, that the district court's injunction is improper, vague, and offends both the Constitution and principles of federalism. We affirm in part and remand in part for modification of the injunction consistent with this opinion.

I.

FACTS AND PROCEEDINGS

A. Background

The Utility is a Texas nonprofit rural water supply company. Approximately 20 years ago, the Texas Water Commission, which has since been succeeded by the Texas Natural Resources Conservation Commission (Commission),[1]

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* Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

[1] The Commission has rule making authority to regulate and supervise retail public utilities' rates, fees, operation and services.

granted Certificate of Convenience and Necessity Number 10553 (Certificate) to the Utility. The Certificate obligates the Utility to provide water services for a large rural area spanning Hidalgo and Willacy counties in South Texas (Certificates Area).[2] To finance construction, operation, and improvement of its water system, the Utility obtained loans and grants from the Farmer's Home Association (FmHA). At the end of 1993, the Utility owed the FmHA approximately $12,000,000.

The City is a home rule municipality located in Hidalgo County, Texas. It owns and operates a municipal water supply system and provides water service in several subdivisions north of the City, some of which lie within the Utility's Certificated Area. As the City developed, the Utility would determine from time to time that various subdivisions of the City that are within the Certificated Area would be better served by the City. In such instances, the Utility would either execute a written release to the City or acquiesce in the City's furnishing water service to those subdivisions. The five other subdivisions[3] which collectively constitute the disputed areas are within the Certificated Area and are currently receiving water service from the City, but the City had never obtained a release from the Utility to service these subdivisions. The Utility objected to the City's providing service to the disputed areas, explaining that

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[2] See Tex. Water Code. Ann. 13.250(a) (Vernon 1988 & Supp. 1995) ("[A]ny retail public utility that possesses a ... certificate of public convenience and necessity shall serve every consumer within its certificates area and shall render continuous and adequate service within the area or areas.") (emphasis added).

[3] The names of these subdivisions are Loma Linda 1, Loma Linda 2, Los Arboles, B&H Mobile Home Park, and Chaparreles.

these subdivisions are within the Certificated Area and are adjacent to the Utility's water service lines. Despite these objections, the City refused to allow the Utility to provide water service to the disputed areas.

B. The Litigation

In December 1993, the Utility brought this action under 7 U.S.C. §1926(b) to enjoin the City from providing water service within the Certificated Area. In July 1994, the City filed applications (Applications) under §§13.254[4] and 13.255,[5] seeking to decertify portions of the Certificated Area and to recertify them in the City's name. On August 18, 1994, before the Commission reached a decision on the Applications, the district court entered an Agreed Preliminary Injunction, enjoining the City from servicing any additional customers within the Certificated Area and ordering the City to contact the Commission and request that it take no further action on the Applications until the expiration of the Agreed Preliminary Injunction.[6]

1. Original Judgment

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[4] Tex. Water Code Ann. §13.254 ("The commissioner at any time after notice and hearing may revoke or amend any certification of public convenience and necessity ... if it finds that the certificate holder has never provided, is no longer providing, or has failed to provide continuous and adequate service in the area, or part of the area, covered by the certificate.").

[5] Id. §13.255 (addressing single certification in an annexed or incorporated area).

[6] This preliminary injunction has not been challenged in this appeal

On December 15, 1994, the district court entered final judgment (Original Judgment) in favor of the Utility and against the City. After noting that under Texas law the Utility had a legal duty to provide continuous and adequate service to residents in the Certificated Area, the district court held that the Utility had, as a matter of law, "made service available" as required by §1926(b). In the alternative, the district court held that because the Utility had water service lines adjacent to the disputed areas, it had, as a factual matter, "made service available" as required by §1926(b). The district court concluded that the City had encroached on the service area of a federally indebted water association and thus violated §1926(b).

The district court found that the Utility's annual net revenue attributable to the disputed areas was approximately $365,000. Accordingly, it permanently enjoined the City from (1) pursuing the Applications; (2) offering to provide or providing service to the disputed areas; and (3) offering to provide or providing water service to areas that lie within the Certified Area but are not currently served by the City, except as agreed to by the Utility. Finally, the court also instructed that the transition of service from the City to the Utility within the disputed areas be accomplished so as to minimize interruption in water service.

2. Amended Judgment

On December 27, 1994, the City filed a motion for a new trial and a motion to alter or amend the judgment (City's Motions). On December 28, 1994, the Utility filed what is "captioned" as a motion for leave to amend its complaint (Utility's Motion). On January 27, 1995, the court overruled the City's Motion, but took the Utility's Motion under advisement. In May 1995, the district court issued an order which construed the Utility's Motion as a Rule 59(e) motion to

amend or alter the judgment and granted it (Amended Judgment).

The Amended Judgment granted the same relief as the Original Judgment. In addition, it clarified that the City must relinquish to the Utility control of the water distribution infrastructures in the disputed areas. On May 5, 1995, the City filed its amended notice of appeal, challenging, inter alia, the district court's findings of fact, its legal conclusions, and the remedy it fashioned.

C. The Commission Agrees With The District Court

On May 30, 1995, the Commission issued a Cease and Desist Order (Commission's Order) at the request of the Utility. The Texas Commission ruled that, as the disputed areas are within the Certificated Area, the Utility had the exclusive right to provide water in the disputed areas. As a result, the Commission's Order directed (1) the Utility to provide "continuous and adequate" service to the disputed areas; (2) the City to continue providing water service to the disputed areas until the Utility initiates service; and (3) the City to cease providing water service to the disputed areas upon initiation of service by the Utility. The Commission declined to order the City to relinquish control of the water distribution infrastructures to the Utility, explaining that it did not have the power to do so. As a final instruction, the Commission ordered the City and the Utility to "mend their fences," by filing applications to reflect the official boundaries of their respective certificated areas.

II.

DISCUSSION

A. The Violation Issues:

1. Standard of Review

We review a judgment on the merits of a nonjury civil case applying the usual standards of review.[7] Thus, we review conclusions of law de novo and findings of fact for clear error.[8] If the district court's account of the evidence is plausible in light of the record viewed in its entirety, we may not reverse even if we are convinced that, had we been sitting as the trier of fact, we would have weighed the evidence differently.[9]

2. The Statute: 7 U.S.C. §1926(b)

The initial issue in this appeal centers around Section 1926(b).[10] That section provides in pertinent part:

> The service provided or made available through any such [indebted water] association shall not be curtailed or limited by the inclusion of the

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[7] See Crisis Transp. Co. v. M/V Erlangen Express, 794 F.2d 185, 187 n.5 (5th Cir. 1986).

[8] See id.

[9] See First United Fin. Corp. v. Speciality Oil Co., Inc. 5 F.3d 944, 947 (5th Cir. 1993) (citing Anderson v. City of Bessemar City, N.C., 470 U.S. 564, 574 (1985)).

[10] 7 U.S.C. §1926(b).

> area within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of said loan ...[11]

The service area of federally indebted water association is sacrosanct. Every federal court to have interpreted §1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment.[12]

In City of Madison, Miss. v. Bear Creek Water Ass'n Inc.,[13] we held that §1926(b) "indicates a congressional mandate that local governments not encroach upon the services provided by such [water] associations, be that encroachment in the form of competing franchises, new or additional permit requirements,

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[11] Id. (emphasis added).

[12] Wayne v. Of Sebring, 36 F.3d 517, 527-28 (6th Cir. 1994), cert. denied, 115 S.Ct. 2000 (1995); Jennings Water, Inc. v. City of North Vernon, Ind., 895 F.2d 311, 315 (7th Cir. 1989); Glenpool Util. Auth. Creek County Rural Water Dist. No. 2, 861 F.2d 1211, 1214 (10th Cir. 1988), cert. denied, 490 U.S. 1067 (1989); City of Madison, Miss. v. Bear Creek Water Ass'n., Inc., 816 F.2d 1057, 1059 (5th Cir. 1987); North Shelby Water Co. v. Shelbyville Mun. Water & Sewer Comm'n, 803 F.Supp. 15, 21 (E.D. Ky. 1992); Pinehurst Enter., Inc. v. Town of Southern Pines, 690 F.Supp. 444, 451 (M.D.N.C. 1988), aff'd, 887 F.2d 1080 (4th Cir. 1989); Moore Bayou Water Ass'n., Inc. v. Town of Jonestown, Miss., 628 F. Supp. 1367, 1369 (M.D. Miss. 1986); Rural Dist. No. 3 v. Owasso Util. Auth., 530 F.Supp. 818, 824 (M.D.Okla. 1979).

[13] 816 F.2d at 1060-61.

or similar means." We explained that the history behind this section indicates two congressional purposes: (1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and (2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansions of nearby cities and towns. With this background, we turn to the violation issue.[14]

3. Did the City Violate §1926(b)?

To secure the protections of §1926(b) the Utility must establish that (1) it has a continuing indebtedness to the FmHA, and (2) the City has encroached on an area to which the Utility "made services available."[15] As of the end of 1993, the Utility owed the FmHA approximately $12,000,000. The City does not contest that the first "indebtedness" element is satisfied. Instead, it contends that the Utility failed to establish the second, "made services available" element. We disagree.

Under Texas law, the Certificate gives the Utility the exclusive right to serve the area within its CCN and obligates it "to serve every consumer within its certified area and . . . render

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[14] Id. at 1060 (citing S.Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2243, 2309).

[15] See 7 U.S.C. §1926(b); see also City of Madison 816 F.2d at 1059; Glenpool, 861 F.2d at 1214.

continuous and adequate service within the area or areas."[16] We hold that the Utility's state law duty to provide service is the legal equivalent to the Utility's "making service available" under §1926(b).[17] When confronted with a similar issue, other courts have reached the same result, holding that when state law obligates a utility to provide water service, that utility has, for the purposes of §1926(b), "made service available."[18]

In the alternative, the district court found as a factual matter that the Utility had "made service available."[19] Specifically, the district court made three findings of fact relevant to this conclusion: (1) The Utility currently provides water service to subdivisions adjacent to the disputed areas; (2) the Utility has lines and adequate facilities to provide service to the disputed areas; (3) the Utility has not refused service to anyone who has requested service within the Certificated Area. These findings of fact are not clearly erroneous. Accordingly,

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[16] See Tex. Water Code. Ann. §13.001(b)(1)(2) & §13.250(a) (West 1988 & Sup. 1995); see also Commission's Order ("[The Utility] holds the CCN for the five [disputed] subdivisions ... and has the legal right to solely serve those subdivisions.").

[17] See Tex. Water Code Ann. 13.250(a) (Vernon 1988 & Supp. 1995) ("[A]ny retail public utility that possesses a ... certificate of public convenience and necessity shall serve every consumer within its certificated area and shall render continuous and adequate service within the area or areas.") (emphasis added).

[18] Glenpool, 861 F.2d at 1214 ("made service available" requirement satisfied if state law requires utility to provide service within a certified area).

[19] North Shelby, 803 F.Supp. at 21 ("made service available" requirement satisfied when utility has water lines running throughout disputed areas).

on the strength of these alternative legal and factual determinations, we affirm the district court's conclusion that the Utility had "made services available" to the disputed areas. As a result, we also agree with the holding of the district court that the City violated §1926(b).

4. Does §1926(b) Violate the Tenth Amendment?

Before turning to the issues of remedy, we pause to address the City's constitutional challenge to §1926(b). For the first time on appeal, the City insists that §1926(b) represents an illegitimate exercise of the Congress' power under the Spending Clause.[20] We will not consider an issue that a party fails to raise in the district court, absent extraordinary circumstances.[21] Extraordinary circumstances exist when the issue involved is a pure question of law and a miscarriage of justice would result from our failure to consider it.[22] Such extraordinary circumstances do not exist here. As this court has previously addressed a similar constitutional challenge (and resolved it contrary to the City's position),[23] we follow our general

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[20] Footnote 8 of the district court's opinion explicitly states, "[n]o Tenth Amendment argument has been made in the present case."

[21] Singleton v. Wulff, 428 U.S. 106, 120 (1976); Thomas v. Capital Sec. Services, 836 f.2d, 866, 884 n.25 (5th Cir. 1988) (en banc).

[22] Verden v. C&B Board Co., Inc., 860 F.2d 150, 155 (5th Cir. 1988).

[23] City of Madison, 816 F.2d at 1060 ("[W]e perceive no significant limitation on the city's powers by virtue of a statute enacted to protect FmHA's subsidy of rural water

forfeiture rule and decline to consider the issue.

B. THE INJUNCTION ISSUES:

1. Standard of Review

The panel reviews the district court's grant or denial of a permanent injunction for abuse of discretion.[24] The district court abuses its discretion if it (1) relies on clearly erroneous factual findings when deciding to grant or deny the permanent injunction (2) relies on erroneous conclusions of law when deciding to grant or deny the permanent injunction, or (3) misapplies the factual or legal conclusions when fashioning its injunctive relief.[25]

2. Was Injunctive Relief Appropriate?

The City urges that the district court's conclusions that the Utility would have suffered irreparable harm and had no adequate legal remedy were "clearly erroneous." The City asserts that the record contains no factual basis for such a conclusions. We disagree. The record reflects the following facts: (1) the Utility is indebted to the FmHA; (2) in the disputed areas the City has encroached on the Utility's service area; and

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authorities."); see also Helvering v. Davis, 301 U.S. 619 (1936) ("When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield").

[24] Peaches Entertainment Corp. v. Entertainment Repertoire Assoc., 62 F.3d 690, 693 (5th Cir. 1995).

[25] Id.

(3) as a result, the Utility would lose revenue exceeding $365,000 a year if the City's encroachment went unabated. The district court held (and we have now affirmed) that, as a legal and factual matter, the Utility had "made services available" to the disputed areas. In other words, unless the City is prevented from violating §1926(b), the Utility will lose $365,000 in annual revenue.

Section 1926 (b) does not create or specify a remedy for the enforcement of violations, but an injunction has been the principle tool employed by the courts with which to enforce the statute and prevent violations.[26] Given these circumstances, we hold that the record contains ample evidence to support the injunction.[27]

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[26] See, e.g., City of Madison, 816 F.2d at 1059 (enjoining a city from annexing subdivisions within a utility's certificated area after finding violation of §1926(b)); see also Jennings Water, 895 F.2d at 315 (a violation of §1926(b) provided sufficient basis for the issuance of an injunction).

[27] The district court's injunction has forbidden the City to provide or offer to provide water service within the entire Certificated Area. This injunction, albeit broad, does not constitute an abuse of discretion. The Utility, by virtue of its indebtedness to the FmHA and state law duty to provide "continuous and adequate" service to the Certificated Area, Tex. Water Code Ann. 13.250(a), has satisfied the requirement of §1926(b) with respect to the entire Certificated Area. Thus, §1926(b) protects the entire Certificated Area from encroachment by the City.

Nevertheless, it would have been more prudent to limit the injunction to the disputed areas, the particular portion of the Utility's service area at the heart of this litigation. As the

3. Is The Injunction Sufficiently Specific?

Next, the City complains that the district court's judgment fails to satisfy the requirements of Rule 65(d).[28] In the form of a laundry list of specious quibbles and rhetorical questions, the City urges that the injunction is vague, unclear, and imprecise. We find that none of these flaws to be present. This injunction is sufficiently and reasonably detailed and specific to permit the transfer of water service from the City to the Utility. Transferring water service from the City to the Utility will be a relatively complicated logistical task, requiring a coordinated effort by both parties. The burdens of any disruption in service will fall more heavily on the residents than on the parties. With an eye on these potential pitfalls, the district court instructed the City to continue uninterrupted water service until the Utility is prepared to commence service, then to cease

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Commission was not a party to this litigation, we assume the district court intended this injunction to apply only to these parties and not to limit the Commissions' power to regulate or redraw the Certificated Area. Such an injunction, purporting to control the actions of the Commission, a state regulatory body, would create a considerably more difficult federalism question: Namely, does §1926(b) also preclude a state regulatory agency from modifying the service area of a federally indebted utility. But, we leave that issue for another day.

[28] Rule 65(d) provides in pertinent part as follows:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained ....

providing water service immediately upon commencement of service by the Utility. Although this order does not choreograph every step, leap, turn, and bow of the transition ballet, it specifies the end results expected and allows the parties the flexibility to accomplish those results. Like the district court, we trust that, despite their differences regarding the right to service the disputed areas, the parties will work together to achieve a smooth transition with no interruption in water service and a minimum of inconvenience to the residents of the disputed areas.

4. Was the Judgment Properly Amended?

The City argues that the district court lacked jurisdiction to amend the Original Judgment and order the City to give the Utility control of the water distribution infrastructures in the disputed areas. First, the City argues that the district court's decision to construe the Motion as a Rule 59(e) motion was "clearly erroneous." Although the City cites no authority for this conclusional proposition, it seems to be arguing that, as a matter of law, a district court cannot construe a motion to amend the complaint as a Rule 59(e) motion. We have found no support for this proposition.

As a general matter, the caption on a pleading does not constrain the court's treatment of a pleading. For example, Rule 8(f) instructs district courts to construe all pleadings so as to do substantial justice, while Rule 8(c) counsels that when a party mistakenly designates a defense as a counter-claim or vice-versa the court shall, if justice so requires, treat the pleading as though it had the proper designation.[29] Thus, the district court could construe the motion as a Rule 59(e) motion so long as the

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[29] See Fed.R.Civ.P. 8.

requirements of Rule 59(e) are met.

Rule 59(e) requires that a motion call into question the correctness of the judgment and be served within ten days after the entry of the judgment.[30] The City does not contest the first element, but attempts to obfuscate the second by arguing that the Utility failed to serve its motion within the ten day limitation period.[31] According to the district court's docket sheet, the Original Judgment was entered on December 15, 1994. The limitations period under Rule 59(e) is less than 11 days, so under Rule 6(a) the date on which the judgment was entered, weekends, and federal holidays are not counted "in computing the period of time prescribed or allowed by these rules."[32] Under this computation method, the Utility had from December 15, 1994 until December 30, 1994 to serve a Rule 59(e) motion.[33] As the City avers that it received a copy of the motion on December 29, 1994, the motion was timely under Rule 59(e). Accordingly, we hold that there was no legal impediment to construing the Utility's Motion as a Rule 59(e) motion and that the motion was timely under the Rule 5(e).

5. The Water Distribution Infrastructures

The City argues that the district court abused its

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30 See Fed.R.Civ.P. 59(e).

31 See id. ("A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.").

32 See Fed.R.Civ.P. 6 (a)

33 Four weekend days and the Christmas holiday account for the extra five days.

discretion when it ordered the City to relinquish the water service infrastructures to the Utility because the relief was unrequested and if granted would prejudiced the City. Citing International Harvester Credit Corp. v. East Coast Truck,[34] the City insists that when the failure to demand the relief granted prejudices the opposing party, the district court abuses its discretion.

We conclude that in ordering the transfer of the infrastructures to the Utility, the district court did not abuse its discretion. Rule 54(c) vests district courts with broad discretion to fashion a remedy, even if the remedy awarded is not specifically requested in the prayer for relief.[35] Although we recognize that Harvester places some limits on the district court's discretion, those limits are modest indeed and clearly were not exceeded here. The law gives the Utility the exclusive right to provide water service to and within the disputed areas. We are under the impression that the developers of the subdivisions installed the infrastructures and ceded them to the City without charge. The infrastructures are indispensable to providing water service to the residents of the subdivisions now that the development is complete. Thus, unless the infrastructures are transferred, the Utility would not be able to provide efficient and economical water service, and the rights of the Utility that are validated here would be useless.

We are, however, concerned that the City may not

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[34] 547 F.2d 888, 891 (5th Cir. 1977).

[35] Fed.R.Civ.P. 54(c) ("[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."); see also International Harvester, 547 F.2d at 891.

receive just and adequate compensation for those items comprising the infrastructures, if any, that the City may have furnished. We have been unable to determine the precisely how the City obtained the infrastructures or any portions thereof other than a suggestion that they received them gratuitously from the developers.[36] Thus, we remand only this sub-issue to

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[36] We do not know from the record or the briefs of the parties by what means or for what prices, the City came into possession of the infrastructures in the disputed areas. In Public Utility Comm'n of TX v. Southwest Water Serv., Inc., 636 S.W.2d 262, 263 n.1 (Tex.Ct.App.--Austin 1982, writ ref'd n.r.e.), the practices of the Texas water and sewer utility industry were described as follows:

> Water and sewer utilities serving suburban or rural areas acquire their facilities, particularly the water and sewer pipe mains and their connections to individual houses or businesses, from the developer of a subdivision. The developer will normally incur the original cost of installing the pipe and setting up the system. More often than not, the developer will recoup the cost of installation of the system when he sells houses in the subdivision. For federal income tax purposes, the developer is also allowed to deduct the cost of the system from the income he receives from the sale of the lots or houses. The developer will then sell or donate the in-place water and sewer system to a newly created utility company. Often, this utility company will be one of several affiliate companies owed by the developer or the development company. Later, when the utility company is operating and seeks to increase the rates it charges its customers, the company will seek to include this property in its rate base as

the district court for it to determine (1) whether the City paid for the infrastructures or any portion thereof, and (2) if so, the amount of just and adequate compensation that should be paid to the City for its reasonable costs and expenses in that regard.

6. Are The Applications Preempted by §1926(b)?

The district court enjoined the City from pursing the Applications with the Commission. The City argues that this aspect of the district court's injunction impermissibly interferes with the legitimate exercise of the State of Texas' regulatory powers. Amicus Texas Rural Water Association urges that the district court's injunction would be impermissible only if it functioned as a limitation or prohibition of the power of the State of Texas to enforce the minimum requirements for the protection of pubic health and safety. We hold that these issues were rendered moot by the Commission's Order.

As discussed above, §1926(b) grants broad protection to

> invested capital. Of course, inclusion of this property in the rate base will expand the rate base and increase the amount of return on the invested capital the utility is entitled to receive in the form of increased rates. Customers of the utility often complain that they are charged twice for the same property-once when they buy the house or lot (and the developer has computed the cost of the system into the purchase price) and second when the utility is allowed an increased return on invested capital because the property is included in the rate base.

Be that as it may, we do not know which if any of these generalizations apply in this case.

federally indebted utilities. In this case, we need not probe the outer limits of that grant. Instead, we decide only the issues presented in this appeal: (1) whether the City, by providing water service to the disputed areas, has violated §1926(b); and (2) if so, what is the appropriate remedy in response to that particular violation. The district court held, as both a factual and legal matter, that the Utility has the exclusive right to provide water service to the disputed areas. With that order, the Applications--which sought a ruling from the Commission that the Utility did not have the exclusive right to provide water service to the disputed areas--became moot. Accordingly, we need not address that issue here.

III.

CONCLUSION

We affirm the district court's judgment that the City violated §1926(b). We also affirm that court's injunction except as to that part which omits a determination of possible repayment of costs and expenses, if any, incurred by the City in acquiring or improving the infrastructures. In that limited respect only, we remand for the district court to consider, and if necessary, to modify its injunction consistent with this opinion.

AFFIRMED, in part, and REMANDED, in part.

APPENDIX B

JUDGMENT OF MAGISTRATE
AND
MEMORANDUM OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

NORTH ALAMO WATER SUPPLY CORPORATION, Plaintiff	§	
VS.	§	**CIVIL ACTION NO. M-93-265**
CITY OF SAN JUAN, TEXAS Defendant	§	

MEMORANDUM OPINION

Plaintiff North Alamo Water Supply Corporation ("North Alamo") brought this action under 7 U.S.C. §1926(b) to enjoin defendant City of San Juan, Texas ("San Juan") from providing water service or obtaining the right to provide service in an area north of San Juan that is within North Alamo's certificate service area.[1] By agreement of the parties, North Alamo's claim for permanent injunctive relief was tried to the Court earlier this year at the time of the hearing on North Alamo's request for a temporary injunction. Since that hearing on the merits, San Juan has filed a number of motions, which were addressed in subsequent hearings.[2] Still pending is San

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[1] Texas Rural Water Association (TRWA), a non-profit association of rural water utilities has appeared as amicus curiae. North Alamo is a member of TRWA.

[2] San Juan filed the following: Motion to Dismiss for Failure to State a Claim; Motion to Dismiss for Failure to Join an Indispensable Party (here, the Texas Natural Resource Conservation Commission); Motion to Join the Farmers Home

Juan's Motion To Dismiss for Lack of Ripeness, filed September 28, 1994, and the merits of North Alamo's request for a permanent injunction.[3]

The outcome of this case turns primarily on the application of 7 U.S.C. §1926(b). Section 1926(b) protects the service areas of federally-indebted, nonprofit rural water supply corporations from encroachment by municipal water suppliers. Plaintiff North Alamo is such a nonprofit utility. The key issue here is whether §1926(b) bars San Juan from initiating state administrative proceedings to obtain part of North Alamo's service area. For the reasons stated more fully below, the Court finds that it does.

I. FACTS

Many of the facts are undisputed.[4] North Alamo is a Texas nonprofit water supply corporation. Approximately 20 years ago, the Texas Water Commission, which has been succeeded by the Texas Natural Resource Conservation Commission (TNRCC), granted Certificate of Convenience and

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Administration as an Additional Plaintiff and Alternative Motion to Dismiss for Failure to Join Indispensable Party; Motion for Leave to Amend and File a Compulsory Counterclaim; Motion to Reopen Discovery; Motion to Reopen Case; and Motion to dismiss for Lack of Ripeness.

[3] This Court has jurisdiction to decide the merits of this case by virtue of the parties' consent and the District Court's referral. 18 U.S.C. §636(c).

[4] This Memorandum Opinion constitutes the Court's findings of fact and conclusion of law. See Fed. R. Civ. P. 52(a).

Necessity (CCN) Number 10553 to North Alamo.[5] By virtue of its CCN, North Alamo has exclusive right to provide potable water to a large rural area spanning Hidalgo and Willacy Counties in South Texas.

To finance the construction, operation, and improvement of its water system, North Alamo has obtained loans and grants from the Farmers Home Administration (FmHA), an agency of the United States Department of Agriculture. At the end of 1993, North Alamo owed FmHA approximately $12,000,000. North Alamo has substantial continuing debt to FmHA.

San Juan is a home rule municipality located in Hidalgo County, Texas. The city owns and operates its own municipal water supply system. San Juan provides water service in certain subdivisions north of the city that are within North Alamo's CCN.

Those subdivisions fall into three categories, two of which give rise to no dispute. For subdivisions in the first category, San Juan obtained a written release from North Alamo before providing water service. With regard to subdivisions in the second category, which include some in which San Juan has provided water service for more than 20 years, North Alamo has acquiesced in the city's service. North Alamo seeks no relief with respect to San Juan's service to subdivisions within either of these categories.

A third category of subdivisions, however, is in dispute. Without obtaining a release from North Alamo, San Juan began

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[5] The TNRCC is the regulatory agency that supervises retail water service in Texas. See Tex. Water Code Ann. §5.001 et seq. (Vernon 1988 & Supp. 1994).

service in each of these areas within the last two years. The disputed subdivisions are Loma Linda 1, Loma Linda 2, Los Chaparrales, B&H Mobile Home Park, and Los Arboles.[6] North Alamo objected to San Juan's service to these subdivisions. With existing water lines nearby, North Alamo could provide service to those subdivisions. In fact, North Alamo is currently providing water to other subdivisions adjacent to those in dispute. As a result of San Juan's service in these five subdivisions, North Alamo has lost and will continue to lose significant revenue.[7]

In addition to the subdivisions that San Juan is already serving, the city seeks to obtain the exclusive right to provide water service to a much larger area. San Juan has applied to the TNRCC to decertify portions of North Alamo's CCN and to obtain its own CCN to serve those areas. San Juan's application seeks not only the entire area surrounding the subdivisions it currently serves (including subdivisions North Alamo serves), but also a larger area to the north that is served solely by North Alamo. North Alamo's annual net revenue attributable to the

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[6] The various subdivisions San Juan is serving in North Alamo's area are shown on the map admitted into evidence as Plaintiff's Exhibit 2. The first category subdivisions are highlighted in pink (and labeled "B"). The second category subdivisions are shown in yellow (and labeled "D"). Subdivisions in the third, or disputed, category are shown in a brown or rust color (and labeled "C"). Subdivisions served by North Alamo are colored green.

[7] North Alamo's assistant manager estimated that the utility will lose over $100,000 in net revenue each year once the subdivisions are fully developed.

area that San Juan seeks to take is approximately $365,000.

North Alamo maintains water lines throughout the area that San Juan seeks to decertify, and North Alamo has plans for expanding its capacity in that area. There is no evidence that North Alamo has refused service to anyone requesting it or that it would be unable to respond to such a request.

II. ANALYSIS

North Alamo asserts that 7 U.S.C. §1926 (b) bars San Juan both from providing water service to customers within North Alamo's certificate area and from pursuing its application with TNRCC to decertify portions of North Alamo's CCN in favor of San Juan. San Juan contends that §1926(b) does not apply under the particular circumstances of this case. In its recent motion to dismiss, San Juan also argues that the ripeness doctrine bars this lawsuit until the TNRCC has decided its application. The Court agrees with North Alamo both that §1926(b) applies in this case and that its claim is ripe for review.

A. 7 U.S.C. §1926 (b)

Congress enacted §1926 to encourage, among other things, the development of low-cost water service in rural areas. Section 1926 authorizes the Secretary of Agriculture to make loans to "associations, including corporations not operated for profit... to provide for... the conservation, development, use, and control of water... ." 7 U.S.C. §1926(a). The monies entrusted to the Secretary for these purposes are managed and disbursed by the Farmers Home Administration (FmHA). See 7 U.S.C. §1981.

Section 1926(b) protects FmHA-indebted rural utilities as follows:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. §1926(b).

Section 1926(b) has been interpreted in a number of cases. Although none of them involved a municipality's initiation of administrative proceedings against an FmHA-indebted rural utility, their reasoning is instructive. The leading decision for our purposes is City of Madison, Miss. v. Bear Creek Water Ass'n, Inc., 816 F. 2nd 1057 (5th Cir. 1987), in which the Fifth Circuit reviewed a district court ruling that barred the city of Madison, Mississippi from pursuing eminent domain proceedings to condemn both Bear Creek's facilities within the Madison city limits and its certificate from the Mississippi Public Utility Commission to operate there. Madison argued that the proceedings were permissible because §1926(b) says nothing about eminent domain. In rejecting Madison's argument, the Fifth Circuit stated:

> The statue unambiguously prohibits any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal annexation or inclusion. This language indicated a congressional mandate that local governments not encroach upon the services provided by such associations, be that

> encroachment in the form of competing franchises, new or additional permit requirements, or similar means. To read a loophole into this absolute prohibition, as Madison would have us do, and allow a city to do via condemnation what it is forbidden by other means, would render nugatory the clear purpose of §1926(b).

816 F.2nd at 1059 (emphasis added) (citation omitted).

Although noting that there was no need to examine the legislative history since the "statutory language is unambiguous and yields no absurd results," the Fifth Circuit addressed Madison's arguments that such broad interpretation of §1926(b) is contrary to congressional intent. Id. the Court found that the legislative history of §1926 revealed two congressional purposes:

> 1) to encourage rural water development by expanding the number of potential users of such system, thereby decreasing the per-user cost, and 2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns.

816 F.2nd at 1060.[8]

Other courts have reached similar conclusions. Glenpool Utility Services Authority v. Creek County Rural Water District

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[8] The Fifth Circuit also rejected Madison's argument that reading §1926(b) to limit a city's sovereign condemnation power would violate the Tenth Amendment. 816 F.2nd at 1060-61. No Tenth Amendment argument has been made in the present case.

No. 2, 861 F.2d 1211 (10th Cir. 1988), cert. denied, 490 U.S. 1067 (1989), involved a municipal water utility that began serving an area newly annexed into the city limits. Years before, a rural water district indebted to the FmHA had annexed the same area. In reversing the district court's denial of relief to the rural water district, the Tenth Circuit agreed with the Fifth Circuit's broad reading of §1926(b) and stated that the "face of the statute makes clear that Congress protected the indebted rural association from curtailment or limitation by impinging municipal corporations." 861 F.2nd at 1214. The Tenth Circuit found that both of the statute's threshold requirements had been met: first, the rural water district had continuing indebtedness to FmHA; and second, it had "made available" water service "by virtue of its line adjacent to the property and its responsibilities to applicants within its territory." Id.

The issue in Jennings Water, Inc. v. City of North Vernon, Indiana, 682 F. Supp. 421 (S.D. Ind. 1988), aff'd, 895 F. 2d 311 (7th Cir. 1989), was whether §1926(b) barred a municipality from contracting to supply water to an area then being supplied by a rural association. After reviewing the relevant case law and legislative history, the court concluded that:

> the statute should not be construed narrowly to prohibit municipal encroachment only if technically by annexation or grant of a franchise, but should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems.

682 F. Supp. at 425. The court then held that the municipality had engaged in competition barred by §1926(b). Id. In affirming, the Seventh Circuit stated that "federal statute, section 1926(b), absolutely bars any encroachment by a

competing water system on a rural water system indebted to the FmHA." 895 F.2d at 318 n. 6 (emphasis added).

In a more recent decision, North Shelby Water Co. v. Shelbyville Municipal Water and Sewer Commission, 803 F.Supp. 15 (E.D. Ky. 1992), the court addressed whether a rural water company's existing water lines near certain development constituted service "made available" within the meaning of 1926(b). In analyzing that issue, the court noted that "all of the federal courts that have interpreted §1926(b) have concluded that the statute should be liberally interpreted so as to protect rural water associations indebted to the [FmHA] from municipal encroachment." Id. at 21 (citation omitted). Although the rural water company had not been granted exclusive rights to any particular service area and had not actually provided water in the subdivisions in question, the court held that, under Kentucky law, it had "made [services] available" by virtue of its distribution lines in or near those subdivisions. Id. at 22.

In the present case, to prevail North Alamo must show that it meets two statutory requirements: 1) it has continuing indebtedness to FmHA; and 2) it has "made [services] available" to the area in question. See Glenpool, 861 F.2d at 1214. As to the first, there can be no dispute that North Alamo has substantial continuing debt to FmHA. San Juan does appear to contend, however, that North Alamo has not "made [service] available" in the area. San Juan also asserts that its application to the TNRCC is not the type of encroachment prohibited by §1926(b).

The determination that North Alamo has "made [services] available" within the meaning of §1926(b) can be made as a matter of law. In Glenpool, the Tenth Circuit found that the rural utility met the "made available" requirement by virtue of a state law obligation to provide service that arose

because the utility had a water line adjacent to the property. 861 F.2d at 1214.[9] Here, North Alamo has the exclusive right to serve the area by virtue of its CCN. Tex. Water Code Ann. §13.001(b)(1),(2) (Vernon 1988 & Supp. 1994). As holder of a CCN, it is also obligated to "serve every consumer within its certified area and... render continuous and adequate service within the area or areas." Id. at §13.250(a). This legal duty satisfies the "made [service] available" requirement.

Moreover, even if this Court were required to look beyond that legal duty, North Alamo has "made [service] available" by virtue of its existing water lines throughout the area sought by San Juan. In the southern half of this area (where San Juan is already providing water to a number of subdivisions), North Alamo has water lines in place and provides water to subdivisions that are adjacent to those served by San Juan. In the northern half of the area (where San Juan is not yet

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[9] The court in North Shelby faced a similar situation. Under Kentucky law, the rural utility's CCN did not grant it any "exclusive rights to service area." 803 F. Supp. at 21. The court therefore conducted a factual inquiry on the "location of North Shelby's actual distribution lines" to determine whether it had "made available" service to the properties in question. Id. The court found that North Shelby had water lines either adjacent to or running through each of the properties. The Court concluded that North Shelby, as a matter of law, had made water service "available" because Kentucky law required it to make reasonable extensions of its water lines to serve any customer who requested it. 803 F.Supp. at 22. Significantly, the court declined the municipal water commission's invitation to examine the "adequacy of the water service North Shelby is presently able to provide... ." Id. at 23.

serving), North Alamo serves a number of subdivisions with its existing water lines.

San Juan argues that initiating an administrative proceeding before the TNRCC is not the type of encroachment barred by §1926(b). The Court disagrees. To be sure, the statute does not specifically address a municipality's attempt to wrest a service area from a rural utility by initiating state administrative proceedings. As reflected in decisions by the Fifth Circuit and other courts, however, the protection afforded by §1926(b) to federally-indebted rural water utilities is "broad and absolute." See Jennings, 895 F. 2d at 315. The Fifth Circuit's holding in Bear Creek is particularly instructive. In addressing the city's argument that §1926(b) did not mention eminent domain, the court held that §1926(b)established an "absolute prohibition" against municipal encroachment, and refused to "allow a city to do so via condemnation what it is forbidden by other means... ." 816 F.2d at 1059. This Court can find no basis for reading §1926(b) to permit San Juan to do by administrative proceedings what it could not do by annexation, eminent domain, or "similar means." See Id.[10]

It is unclear whether San Juan denies that its recent service to subdivisions within North Alamo's certificate area is

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[10] This is particularly true since, as San Juan has argued, the administrative proceeding it initiated is "entirely indistinguishable" from an eminent domain proceeding. See San Juan's Suppl. Memo. in Support of its Mo. to Join the FmHA As An Add'l. Pl. (Docket No. 28) at pp. 18-19. San Juan filed its application to TNRCC under Texas Water Code §13.255, which San Juan has described as "an eminent domain-type administrative proceeding pursuant to which a city may take over a utility's assets... ." Id.

an encroachment under §1926(b). The Court concludes that it is. It is difficult to imagine a clearer example of encroachment: a municipality is providing water service within a federally-indebted rural utility's service area despite the utility's objections.

In sum, the Court finds that §1926(b) bars both San Juan's initiation of administrative proceedings to take an important part of North Alamo's service area as well as San Juan's current service to certain subdivisions within that area.

B. Ripeness Doctrine

San Juan has moved to dismiss for lack of ripeness in light of its pending application before TNRCC. According to San Juan, §1926(b) requires a factual inquiry as to whether North Alamo has "made [service] available," and the TNRCC has made no final ruling on the issue. San Juan contends that this lawsuit challenges what TNRCC might do and thus addresses a hypothetical question that is not ripe. The Court agrees with North Alamo that the ripeness doctrine does not bar this action.

Courts must be careful to avoid "futile or premature interventions, especially in the field of public law." Public Service Comm'n. of Utah V. Wycoff Co., 344 U.S. 237, 243 (1952). For a matter to be ripe for judicial review, there must be a substantial controversy of sufficient immediacy and reality between parties having adverse legal interests." Middle South Energy, Inc. v. City of New Orleans, 800 F.2d 488, 490 (5th Cir. 1986) (citing Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941)). In the context of a challenge to agency action, the ripeness doctrine is designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been

formalized and its effects felt in a concrete way by the challenging parties. Abbot Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). The question of ripeness turns on "the fairness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id. at 149.

San Juan's position is premised on the assumption that the TNRCC will make a finding on whether North Alamo has "made available" water service a defined under §1926(b). This assumption is far from obvious. Presumably, the TNRCC would apply the relevant provision of Texas law to the matter pending before it. See Tex. Water Code §13.55 (Vernon 1988 & Supp. 1994). Nor is it apparent why a federal court should defer to a state agency on a question involving the interpretation of a federal statute. As reflected in this Court's analysis, application of §1926 here is primarily a legal question that is fit for judicial decision. Cf. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 200-201 (1983) ("predominantly legal" preemption question is ripe for judicial review.) Other federal courts have not hesitated to apply §1926's "made available" requirement to the facts before them. See, e.g., Glenpool, 861 F.2d at 1214; North Shelby, 803 F. Supp. at 22.

Moreover, this case should not be viewed as a premature challenge to the action of a state administrative agency. North Alamo requests no injunctive or other relief against the TNRCC. Rather, North Alamo seeks to enjoin San Juan from proceeding with its application to decertify part of North Alamo's service area and from continuing to provide water service to certain subdivisions within North Alamo's certificate area.[11] There is

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[11] It is significant that the TNRCC did not initiate its own review of the adequacy of North Alamo's water service;

nothing hypothetical about San Juan's actions.

This distinction is illustrated by Middle South Energy, which is cited by San Juan. In that case, an electric utility sought an injunction to prevent the city from exercising an option to purchase the utility. The Fifth Circuit noted that although the city had taken steps to preserve its right to exercise the purchase option and had received a recommendation that it do so, the recommendation had not been adopted by the city council. The court held that "until the City Council actually vote[d] to exercise the purchase option," the dispute was not ripe for adjudication. 800 F.2d at 491. Here, in contrast, San Juan has already initiated the administrative proceeding to obtain part of North Alamo's service area and is serving customers in North Alamo's area.

Perhaps most significantly, to apply the ripeness doctrine as urged by San Juan would undermine the congressional mandate reflected by §1926(b) and result in hardship to North Alamo. Congress established an "absolute prohibition" against municipal encroachment upon the services provided by FmHA-indebted rural water association in order "to safeguard the viability and financial security of such associations (and FmHA's loans)." Bear Creek, 816 F.2d at 1059-60. At a minimum, requiring North Alamo to litigate before the TNRCC in response to San Juan's application would cause North Alamo or incur substantial legal fees, not to mention the costs associated with the lost time and resources of its employees. Such a result itself would undermine North Alamo's ability to provide low-cost water service to its customers. See id. at 1059. the "evil Congress wished to avoid" will be even more pronounced if the TNRCC proceeding result in North Alamo's loss of the valuable

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instead, the TNRCC is responding to San Juan's application.

service area any issue. Id. at 1060.[12] The likely hardship to North Alamo further confirms that this case is ripe for judicial review.

In concluding that the ripeness doctrine does not apply here, this Court nonetheless agrees with San Juan that the TNRCC has jurisdiction to regulate North Alamo's water service in accordance with Texas law.[13] Nothing in this Court's ruling prevents the TNRCC from instituting enforcement proceedings

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[12] Although not raised by the parties, these circumstances suggest the possibility that §1926(b) preempts the state administrative procedure invoked by San Juan. the Fifth Circuit addressed preemption very recently in a case involving analogous facts, City of Morgan City v. South Louisiana Elec. Coop. Ass'n, 31 F.3d 319 (5th Cir. 1994). In that case, a city attempted to condemn a federally-indebted rural electric utility's equipment and service rights in an area annexed by the city. Noting that Congress passed the Rural Electrification Act, 7 U.S.C. §901 et seq., to insure low-cost electric service to rural areas, the Fifth Circuit held that Louisiana's condemnation procedure was preempted because it frustrated the purpose of the federal statute. 31 F.2d at 324. In researching this conclusion, the court relied heavily on the reasoning in Bear Creek. Id.

[13] San Juan quotes from North Shelby for the proposition that determining the "adequacy of water service to be provided is within the exclusive jurisdiction of the appropriate regulatory agencies... ." 803 F.Supp. at 23. What San Juan does not emphasize, however, is that "the adequacy of the water service [the rural utility] is presently able to provide, including fire protection, is irrelevant to a determination whether [the utility] is entitled to the protections of §1926(b)." Id. (citation omitted).

on its own to investigate and remedy suspected inadequacies of service, see Tex. Water Code Ann. §13.253(1) (Vernon 1988 & Supp. 1994), or from otherwise regulating North Alamo. What it does mean is that San Juan may not proceed with its application to decertify part of North Alamo's certificate area, just as San Juan would be prohibited from annexing or condemning that area.

C. Other Defenses

San Juan has raised a number of affirmative defenses, including estoppel, laches, waiver, abandonment, and statute of limitations. San Juan asserts these defenses only with respect to North Alamo's request to enjoin San Juan from providing water service in areas that San Juan was serving at the time the complaint was filed. After considering these defenses, the Court concluded that they merit only brief discussion.

Drawing an analogy between the present action and a trespass action under state law, San Juan contends that a two-year statute of limitations applies. There is no need to explore whether this two-year statute of limitation applies here because, even assuming that it did, it would not bar North Alamo's claim. In each of the five subdivisions in dispute, San Juan began providing water service in 1992 or 1993. Since North Alamo filed this action in December 1993, San Juan's encroachment in each of these subdivisions occurred within a two-year period. Similarly, there is no basis to conclude that North Alamo's claim as to those areas is barred by laches.

San Juan 's assertion of the defenses of estoppel and waiver is likewise misplaced. Those defenses are factually unsupported with respect to the subdivisions in dispute. North Alamo has objected to San Juan's recent commencement of service in those areas. Moreover, as the Court held in Jennings,

waiver and estoppel cannot prevent the application of a statute, such as §1926(b), enacted to protect the public interest. 682 F.Supp. at 426.

D. Appropriate Relief

North Alamo seeks a permanent injunction barring San Juan from proceeding with its application before the TNRCC and prohibiting San Juan from providing water service to certain disputed subdivisions within North Alamo's certificated area. North Alamo also seeks an award of attorney's fees.

Permanent injunction relief is appropriate where there is no adequate remedy at law. See, e.g., Posada v. Lamb County, Texas, 716 F.2d 1066, 1070 (5th Cir. 1983). Here, the Court finds that North Alamo has no adequate legal remedy. Moreover, the interest served by §1926(b) established an appropriate basis for injunctive relief. Jennings, 895 F.2d at 318 n. 6; see also North Shelby, 803 F. Supp. at 23 (rural utility protected under §1926(b) is entitled to an injunction).

With respect to attorney's fees, the general rule is that each party bears its own legal fees in the absence of a statute specifically providing for fees. See Forgerty v. Fantasy, Inc., 114 S. Ct. 1023, 1033 (1994) (citing Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247-62 (1975)). Section 1926 does not provide for an award of attorney's fees and North Alamo has failed to point to any statutory basis for such an award here. Accordingly, North Alamo's request for attorney's fees is denied.

III. CONCLUSION

For the reasons set forth above, the Court concludes that plaintiff North Alamo is entitled to the protection of §1926(b)

and that the injunctive relief it seeks is appropriate. A judgment consistent with this opinion will be entered.

DONE in McAllen, Texas on this the14th day of December, 1994.

Peter E. Ormsby
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

NORTH ALAMO WATER SUPPLY CORPORATION, Plaintiff	§	
VS.	§	CIVIL ACTION NO. M-93-265
CITY OF SAN JUAN, TEXAS Defendant.	§	

AMENDED FINAL JUDGMENT

In accordance with the Memorandum Opinion reflecting the Court's findings of fact and conclusions of law, see Fed. R. Civ. P. 52(a), the Court entered Final Judgment in favor of plaintiff North Alamo Water Supply Corporation (North Alamo) and against defendant City of San Juan, Texas ("San Juan') on December 15, 1994. Consistent with the Court's subsequent rulings on San Juan's Motion to Alter or Amend the Judgment and North Alamo's Motion for Leave to Amend Complaint, the Court now enters this amended judgment.

It is, therefore, ORDERED, ADJUDGED, and DECREED that judgment be entered in favor North Alamo and against San Juan on North Alamo's claim for permanent injunctive relief brought under 7 U.S.C. §1926(b).

It is further ORDERED, ADJUDGED, and DECREED that San Juan be permanently enjoined as follows:

1) San Juan shall not pursue its application to the

Texas Natural Resource Conservation Commission for partial decertification of North Alamo's service area as provided in its Certificate of Convenience and Necessity (CCN).

2) San Juan shall not provide or offer to provide water service within the subdivisions of Loma Linda No.1, Loma Linda No. 2, B&H Mobile Home Park, Los Arboles, and Los Chaparales, all in Hidalgo County, Texas. San Juan shall relinquish control to North Alamo of the water distribution infrastructure in those subdivisions, which San Juan obtained at little or no cost in connection its violation of 7 U.S.C. §1926(b). The transition from San Juan to North Alamo as water supplier in those subdivisions shall be accomplished so as to minimize expense to customers, interruption in water service, or other inconvenience to customers.

3) San Juan shall not provide or offer to provide water service within subdivisions and areas not currently served by San Juan, but within North Alamo's service area as set out in its CCN, except by North Alamo's written agreement or release.

4) As North Alamo seeks no relief with regard to certain subdivisions, nothing in the above paragraphs shall be construed to prohibit San Juan from continuing to provide water service in those subdivisions and areas it is currently serving (with the exception of the subdivisions identified in paragraph 2).

It is furthered ORDERED, ADJUDGED and DECREED that costs shall be taxed against San Juan. North Alamo's request for attorney's fees is DENIED.

DONE at McAllen, Texas this 11th day of May, 1995

Peter E. Ormsby
UNITED STATES
MAGISTRATE JUDGE

APPENDIX C

ORDER DENYING MOTION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 95-40048

NORTH ALAMO WATER SUPPLY CORPORATION
Plaintiff - Appellee

v.

CITY OF SAN JUAN, TX
Defendant - Appellant

Appeal from the United States District Court for the

Southern District of Texas, McAllen

ON PETITION FOR REHEARING

(June 3, 1996)

Before KING, WIENER, and BENAVIDES, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX D

ORDER OF TEXAS NATURAL RESOURCES CONSERVATION COMMISSION

TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION

AN ORDER Granting the Petition of North Alamo Water Supply Corporation for a Cease and Desist Order against the City of San Juan; Docket No. 95-0599-UCR

On May 24, 1995, the Texas Natural Resource Conservation Commission (Commission) considered the petition of the North Alamo Water Supply Corporation (North Alamo) for a water Cease and Desist Order against the City of San Juan for several subdivisions within North Alamo's water CCN area in Hidalgo County, Texas. The hearing was held pursuant to Section 13.252 of the Texas Water Code. The petition was presented to the Commission with a Proposal for Decision by Bill Zukauckas, Attorney, a Commission Hearings Examiner, who was assigned to hold the consolidated hearing on these and other applications which were part of a tangentially-related CCN request by North Alamo, San Juan, and other parties. This matter was consolidated with those sewer matters because the San Juan and North Alamo parties were the same and the same geographic area was involved.

Public hearings concerning the applications were conducted on November 8, 1993, October 11, 1994, and January 17, 1995 in Austin, Texas. The Examiner designated the following as parties to the consolidated proceeding: the Executive Director of the Commission; the Public Interest Counsel of the Commission; the City of San Juan; North Alamo Water Supply Corporation; Military Highway Water Supply Corporation; the City of Edinburg; the City of Elsa; the City of La Villa; the City of Weslaco; and the City of Edcouch.

After considering the Examiner's Proposal for Decision

and the evidence and arguments presented, the Commission makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On November 8, 1993, North Alamo Water Supply Corporation filed a petition with Texas Water Commission (predecessor agency to the Texas Natural Resource Conservation Commission) for a cease and desist order against the City of San Juan.

2. North Alamo is a non-profit, member-owned water supply corporation authorized under Article 1434, TEX. REV. CIV. STAT. ANN.

3. Proper notice of the hearing was given pursuant to Section 2001.051 of the Administrative Procedure Act, TEX. GOV'T CODE § 2001.001, *et seq*.

4. The following subdivisions all currently receive water utility service from San Juan within the water CCN area of North Alamo: Los Chaparales, Loma Linda I and II, Los Arboles, and B & H.

5. North Alamo has agreements with San Juan to serve some subdivisions within its water CCN area. These subdivisions are not part of the cease and desist request.

6. There is no agreement between North Alamo and San Juan which would allow San Juan to provide water service for the five subdivisions referenced in Finding of Fact No. 4.

7. North Alamo has not waived its right to request a cease and desist order for the subject subdivisions by allowing

San Juan to serve other subdivisions within its service area or for any other reason.

CONCLUSIONS OF LAW

1. Proper notice of hearing was given pursuant to Section 2000.051 of the Administrative Procedure Act, TEX. GOV'T CODE ANN. §2001.001, *et seq.*

2. North Alamo Water Supply Corporation and the City of San Juan are retail public utilities under Section 13.002(19) of the Texas Water Code.

3. The Texas Natural Resource Conservation Commission has jurisdiction to consider the petition and is authorized to issue cease and desist orders pursuant to Section 13.041 of the Texas Water Code.

4. The public hearing concerning this petition was held under the authority of and in accordance with Chapter 13 of the Texas Water Code and the substantive rules of the Texas Natural Resource Conservation Commission.

5. North Alamo Water Supply Corporation holds the water CCN for the five subdivisions in question and has legal right to solely serve those subdivisions.

6. The Commission has no authority to authorize or order the transfer of the infrastructure within the five subdivisions from the City of San Juan to North Alamo Water Supply Corporation.

WHEREAS Chairman John Hall, Commissioner Ram Reed and Commissioner R.B. "Ralph" Marquez vote unanimously to issue this order;

NOW, THEREFOR, BE IT ORDERED BY THE TEXAS NATURAL RESOURCE CONSERVATION COMMISSION THAT:

1. North Alamo Water Supply Corporation render continuous and adequate service to the following subdivisions known as Los Chapparales, Loma Linda I and II, Los Arboles, and B & H that are within the North Alamo Water Supply Corporation water CCN area.

2. The City of San Juan continues providing water utility service to the subdivision known as Los Chaparales, Loma Linda I & Lima II, Los Arboles, and B & H until North Alamo initiates service to those subdivisions. Upon initiation of service by North Alamo, the City of San Juan cease providing service to the above-referenced subdivisions.

3. The City of San Juan and North Alamo Water Supply Corporation be required to file applications to amend their water CCNs by June 1, 1995. This filing is to reflect official lines within their respective CCN areas for those subdivisions where there is an agreement between the utilities that is not reflected on the official WRS map at the Commission.

4. The Chief Clerk of the Commission forward a copy of this Order to all parties.

5. If any provision, sentence, clause, or phase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of this Order.

Issue Date: May 30, 1995

TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION

_____

John Hall, Chairman

ATTEST:

_____

Gloria A. Vasquez,
Chief Clerk

APPENDIX E

FINAL JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

NORTH ALAMO WATER SUPPLY CORPORATION,	§	
Plaintiff	§	
	§	
VS.	§	**CIVIL ACTION**
	§	**NO. M-93-265**
	§	
CITY OF SAN JUAN, TEXAS,	§	
Defendant.	§	

FINAL JUDGMENT

On February 22, 1994, with the agreement of the parties, this action was heard by the Court sitting without jury. Since hearing the merits of the claim filed by plaintiff North Alamo Water Supply Corporation ("North Alamo"), defendant City of San Juan, Texas ("San Juan") filed a number of motions, all of which have now been briefed by the parties and heard and decided by the Court. Today, the Court has entered a Memorandum Opinion that reflects the Court's findings of fact and conclusion of law on the merits of plaintiff's claim. See Fed. R. Civ. P. 52(a). The Court now enters judgment in accordance with those findings and conclusions.

It is, therefor, ORDERED, ADJUDGED, and DECREED that San Juan be permanently enjoined as follows:

1) San Juan shall not pursue its application to the Texas Natural Resource Conservation Commission for partial decertification of North Alamo's service area as provided in its

Certificate of Convenience and Necessity (CCN).

2) San Juan shall not offer to provide or provide water service within the subdivisions of Loma Linda No. 1, Loma Linda No. 2, B&H Mobile Home Park, Los Arboles and Los Chaparales, all in Hidalgo County, Texas. The transition from San Juan to North Alamo as water supplier in those subdivisions shall be accomplish so as to minimize any interruption in water service or other inconvenience to customers.

3) San Juan shall not offer to provide or provide water service within subdivisions and areas not currently served by San Juan, but within North Alamo's service area as set out in its CCN, except by North Alamo's written agreement or release.

4) As North Alamo seeks no relief with regard to certain subdivisions, nothing in the above paragraphs shall be construed to prohibit San Juan from continuing to provide water service in those subdivisions and areas it is currently serving (with the exception of the subdivision identified in paragraph 2).

It is furthered ORDERED, ADJUDGED, and DECREED that costs shall be taxed against San Juan. North Alamo's request for attorney's fees is DENIED.

DONE at McAllen, Texas this 14th day of December, 1994.

_____

Peter E. Ormsby
UNITED STATES

MAGISTRATE JUDGE

APPENDIX F

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Texas Water Code §13.254. Revocation or Amendment of Certificate

(a) The commission at any time after notice and hearing may revoke or amend any certificate of public convenience an necessity with the written consent of the certificate holder or if it finds that the certificate holder has never provided, is no longer providing, or has failed to provide continuous and adequate service in the area, or part of the area, covered by the certificate.

(b) Upon written request from the certificate holder, the executive director may cancel the certificate of a utility or water supply corporation authorized by rule to operate without a certificate of public convenience and necessity under Section 13.242 (c).

(c) If the certificate of any public utility is revoked or amended, the commission may require one or more public utilities to provide service in the area in question.

Texas Water Code §13.255. Single Certification in Incorporated of Annexed Area

(a) In the event that an area is incorporated or annexed by a municipality, either before or after the effective date of this section, the municipality and a retail public utility that provides water or sewer service to all or part of the area pursuant to a certificate of convenience and necessity may agree in writing that all or part of the area may be served by a municipality owned utility, by a franchised utility, or by the retail public

utility. In this section, the phrase "franchised utility"shall mean a retail public utility that has been granted a franchise by a municipality to provide water or sewer service inside municipal boundaries. The agreement may provide for single or dual certification of all or part of the area, for the purchase of facilities or property. and for such other or additional terms that the parties may agree on. If a franchised utility is to serve the area, the franchised utility shall also be a party to the agreement. The executed agreement shall be filed with the commission, and the commission, on receipt of the agreement, shall incorporate the terms of the agreement into the respective certificates of convenience and necessity of the parties to the agreement.

(b) If an agreement is not executed within 180 days after the municipality, in writing, notifies the retail public utility of its intent to provide service to the incorporated or annexed area, and if the municipality desires and intends to provide retail utility service to the area, the municipality, prior to providing service to the area, shall file an application with the commission to grant single certification to municipally owned water or sewer utility or to a franchised utility. If an application for single certification is files, the commission shall fix a time and place for a hearing and give notice of the hearing to the municipality and franchised utility, if any, and notice of the application and hearing to the retail public utility.

(c) The commission shall grant single certification to the municipality. The commission shall also determine whether single certification as requested by the municipality would result in property of a retail public utility being rendered useless or valueless to the retail public utility, and shall determine in its order the monetary amount that is adequate and just to compensate the retail public utility for such property. If the municipality in its application has requested the transfer of specified property of the retail public utility to the municipality

or to a franchise utility, the commission shall also determine in its order the adequate and just compensation to be paid for such property pursuant to the provisions of this section, including and award for damages to property remaining in the ownership of the retail public utility after single certification. The order of the commission shall not be effective to transfer property. A transfer of property may only be obtained under this section by a court judgment rendered pursuant to Subsection (d) or (e) of this section. The grant of single certification by the commission shall go into effect on the date the municipality or franchised utility, as the case may be, pays adequate and just compensation pursuant to court order, or pays an amount into registry of the court or to the retail public utility under Subsection (f). If the court judgment provides that the retail public utility is not entitled to any compensation, the grant of single certification shall go into effect when the court judgment becomes final. The municipality of franchised utility must provide to each customer of the retail public utility being acquired an individual written notice within 60 days after the effective date for the transfer specified in the court judgment. The notice must clearly advise the customer of the identity of the new service provided, the reason for the transfer, the rates to be charged by the new service provider, and the effective date of those rates.

(d) In the event the final order of the commission is not appealed within 30 days, the municipality may request the district court of Travis County to enter a judgment consistent with the order of the commission. In such event, the court shall render a judgment that:

(1) Transfers to the municipality owned utility or franchised utility title to property to be transferred to the municipality owned utility or franchised utility as delineated by the commission's final order and property determined by the commission to be rendered useless or valueless by the granting

of single certification; and

(2) orders payment to the retail public utility of adequate and just compensation for the property as determined by the commission in its final order.

(e) Any part that is aggrieved by a final order of the commission under this section may file an appeal within the district court of Travis County within 30 days after the order becomes final. The hearing in such an appeal before the district court shall be by trail de novo on all issues. After the hearing, if the district court determines that the municipality owned utility or franchised utility is entitled to single certification under the provisions of this section, the court shall enter a judgment that:

(1) transfer to the municipality owned utility or franchised utility title to property requested by the municipality to be transferred to the municipally owned utility or franchised utility and located within the singly certificated area and property determined by the court or jury to be rendered useless or valueless by the granting of single certification; and

(2) orders payment in accordance with Subsection (g) of this section to the retail public utility of adequate and just compensation for the property transferred and for the property damaged as determined by the court or jury.

(f) Transfer of property shall be effective on the date the judgment becomes final. However, after the judgment of the court is entered, the municipality or franchised utility may take possession of condemned property pending appeal if the municipality or franchised utility pays the retail public utility or pays into the registry of the court, subject to withdrawal by the retail public utility, the amount, if any, established in the court's

judgment as just and adequate compensation. To provide security in the event an appellate court, or the trial court in a new trial or on remand, awards compensation in excess of the original award, the municipality or franchised utility, as the case may be, shall deposit in the registry of the court an additional sum in the amount of the award, or a surety bond in the same amount issued by a surety company qualified to do business in this state, conditioned to secure the payment of an award of damages in excess of the original award of the trial court. On application by the municipality or franchised utility, the court shall order that funds deposited in the registry of the court be deposited in an interest-bearing account, and that interest accruing prior to withdrawal of the award by the retail public utility be paid to the municipality or to the franchised utility. In the event the municipality owned utility or franchised utility takes possession of property or provides utility service in the singly certificated area pending appeal, and a court in a final judgment in an appeal under this section holds that the grant of single certification was in error, the retail public utility is entitled to seek compensation for any damages sustained by it in accordance with Subsection (g) of this section.

(g) For the purpose of implementing this section, the value of real property shall be determined according to the standards set forth in Chapter 21, Property Code, governing actions in eminent domain; the value of personal property shall be determined according to the factors in this subsection. The factors ensuring that the compensation to a retail public utility for the taking, damaging, and/or loss of personal property, including the retail public utility's business, is just and adequate, shall, at a minimum, include: impact on the existing indebtedness of the retail public utility and its ability to repay that debt, the value of the service facilities of the retail public utility located within the area in question, the amount of any expenditure for planning, design, or construction of service facilities outside the

incorporated or annexed area that are allocable to service to the area in question, the amount of the retail public utility's contractual obligations allocable to the area in question, any demonstrated impairment of service or increase of cost to customers of the retail public utility remaining after the single certification, the impact on future revenues and expenses of retail public utility, necessary and reasonable legal expenses and professional fees, factors relevant to maintaining the current financial integrity of the retail public utility, and other relevant factors.

(h) A municipality or a franchised utility may dismiss an application for single certification without prejudice at any time before a judgment becomes final provided the municipaiity or the franchised public utility has not taken physical possession of property of the retail public utility or made payment for such right pursuant to Subsection (f) of this section.

(i) In the event that a municipality files an application for single certification on behalf of a franchised utility, the municipality shall be joined in such application by such franchised utility, and the franchised utility shall make all payments required in the court's judgement to adequately and justly compensate the retail public utility for any taking or damaging of property and for the transfer of property to such franchised utility.

(j) This section shall apply only in a case where:

(1) the retail public utility that is authorized to serve in the certificated area that is annexed or incorporated by the municipality is a nonprofit water supply or sewer service corporation or a special utility district under Chapter 65, Water Code; or

(2) the retail public utility that is authorize to serve in the certificated area that is annexed or incorporated by the municipality is a retail public utility, other than a nonprofit water supply or sewer service corporation, and whose service area is located entirely within the boundaries of a municipality with a population of 1.7 million or more according to the most recent federal census.

(k) The following conditions apply when a municipality or franchised utility makes an application to acquire the service area or facilities of a retail public utility described in Subsection (j)(2):

(1) the commission or court must determine that the service provided by the retail public utility is substandard or its rates are unreasonable in view of the reasonable expenses of the utility;

(2) if the municipality abandons its application, the court or the commission is authorized to award to the retail public utility its reasonable expenses related to the proceeding hereunder, including attorney fees; and

(3) unless otherwise agreed by the retail public utility, the municipality must take the entire utility property of the retail public utility in a proceeding hereunder.

(l) The compensation provided under Subsection (g) shall be determined by a qualified individual or firm to serve as independent appraiser, who shall be selected by the affected retail public utility. The determination of compensation by the independent appraiser shall be binding on the commission. The costs of the independent appraiser shall be borne by the municipality.

(m) The commission shall deny an application for single certification by a municipality that fails to demonstrate compliance with the commission's minimum requirements for public drinking water systems.

U.S. Constitution, art. I, §8, cl.1

The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the debts and provide for the common Defense and general Welfare of the United State; but all Duties, Imposts and Excises shall be uniform throughout the United States.

U.S. Constitution, art. I, §8, cl.18

To make all Laws which shall be necessary and proper for carrying into Execution the forgoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

7 U.S.C. §1926(b)

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by an association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan.

(3)

96-668

No. _____

Supreme Court, U.S.
FILED
OCT 1 1996
CLERK

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1996

CITY OF SAN JUAN, TEXAS,
Petitioner

vs.

NORTH ALAMO WATER SUPPLY CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This case concerns the City of San Juan, Texas *("San Juan")* encroaching on North Alamo Water Supply Corporation's *("North Alamo")* certificated service area in violation of 7 U.S.C. § 1926(b) *("the Statute")* and the relief granted to North Alamo by the Federal District Court, Southern District Court of Texas (McAllen Division) *("District Court")*. The District Court permanently enjoined San Juan from pursuing applications with the Texas Natural Resources Conservation Commission *("TNRCC")* to decertify a portion of North Alamo's service area. The District Court also permanently enjoined San Juan from continuing to provide water service within North Alamo's certificated area.

San Juan raised no constitutional challenge to the Statute in District Court. San Juan first raised its constitutional arguments before the Fifth Circuit Court of Appeals *("Court of Appeals")*. As set forth more fully in this Brief, San Juan's constitutional challenge to the Statute has not been properly preserved for appeal and its arguments in favor of granting its Petition are without merit.

A. Course of Proceedings

On December 30, 1992, San Juan filed an application with the TNRCC for a water Certificate of Convenience and Necessity *("CCN")* and to decertify portions of North Alamo's water CCN No. 10553 pursuant to § 13.255 of the Texas Water Code. TEX. WATER CODE ANN. § 13.255 (Vernon 1988 & Supp. 1995). Although alleged by San Juan, it is unclear from the TNRCC record whether San Juan actually sought decertification of North Alamo's certificated area pursuant

to § 13.254 of the Texas Water Code. (San Juan's Appendix D). The TNRCC is the regulatory agency which supervises rates, operations and services of retail water utilities for the State of Texas. North Alamo holds a CCN from the TNRCC which obligates North Alamo to provide service to all areas within its CCN. The CCN, as a matter of Texas law, grants North Alamo an exclusive right and imposes a duty to provide continuous and adequate service to the CCN area. TEX. WATER CODE ANN. § 13.001(b)(1) & (2) (Vernon Supp. 1995); TEX. WATER CODE ANN. § 13.250(a) (Vernon 1988 & Supp. 1995). The areas in dispute between the parties are five subdivisions. See also, (San Juan's Appendix "A").

San Juan based its § 13.255 application on the assertion that since these subdivisions were within San Juan's corporate boundaries (San Juan having annexed these areas), it was entitled to serve the area without regard to North Alamo's rights under its CCN. San Juan maintained that Section 13.255 of the Texas Water Code automatically entitled San Juan to a CCN for the area and thus the exclusive right to provide water service to the area.

However, under Texas law, a municipality does not have an automatic right to immediately provide service in an area simply because the municipality annexes the area. The municipality is required by the Code to obtain TNRCC authorization to serve the area before service is provided. TEX. WATER CODE ANN. § 13.247(a) (Vernon Supp. 1995); TEX. WATER CODE ANN. § 13.255 (Vernon 1988 & Supp. 1995). Until such authorization is obtained, service by a municipality is prohibited by Section 13.247 of the Texas Water Code. TEX. WATER CODE ANN. § 13.247 (Vernon 1988 & Supp. 1995) (prohibits municipalities from providing service in annexed areas

within the area covered by an existing CCN without first having obtained from the commission a certificate of public convenience and necessity that includes the area to be served).

On November 8, 1993, North Alamo applied to the TNRCC for a cease and desist order against San Juan to halt San Juan's service of customers within North Alamo's CCN. Section 13.252 of the Texas Water Code grants the TNRCC authority to prevent one utility from interfering with the rights of another utility. The section provides that if one utility makes service available in an area already certificated to another utility, the TNRCC "may issue an order prohibiting the construction, extension, or provision of service or prescribing terms and conditions for locating the line, plant, or system affected or for the provision of the service." TEX. WATER CODE ANN. § 13.252 (Vernon Supp. 1995).

Also, in its request for a cease and desist order, and in its response to San Juan's application to decertify, North Alamo informed the TNRCC that the application filed by San Juan to have North Alamo decertified from serving the five subdivisions violated 7 U.S.C. § 1926(b).

On December 10, 1993, North Alamo filed a complaint in the District Court. North Alamo alleged that San Juan was violating 7 U.S.C. § 1926(b) by providing and offering to provide water service to customers in North Alamo's service area, and by pursuing its application with the TNRCC to decertify a portion of North Alamo's service area.

North Alamo's complaint requested injunctive and other relief under 7 U.S.C. § 1926(b). North Alamo sought to enjoin San Juan from directly or indirectly offering to provide or providing water service to customers in North Alamo's service area, to have the five subdivisions being served by San Juan transferred to North Alamo for service, and to prevent San Juan from pursuing its application with the TNRCC. However, North Alamo did not request any relief against the State of Texas, nor was the State of Texas a party to the action. San Juan did not raise any constitutional issues before the District Court regarding the applicability of the statute to San Juan, nor did it raise any objections to the Statute as preempting Texas law.

On February 22, 1994, by agreement of the parties, the case was heard by the U.S. Magistrate, sitting without a jury. (R. 19,25). On August 18, 1994, the District Court entered an Agreed Preliminary Injunction enjoining San Juan from serving any additional customers within North Alamo's service area. The Preliminary Injunction further ordered San Juan to contact the TNRCC and request that the TNRCC take no further action with respect to San Juan's application until the expiration of the Agreed Preliminary Injunction.

On September 30, 1994, the Court overruled numerous defensive motions previously filed by San Juan, including San Juan's Motion to Dismiss for Failure to State a Claim upon Which Relief can be Granted, San Juan's Motion to Dismiss for Failure to Join the TNRCC and the State of Texas as Indispensable Parties and San Juan's Motion to Join the Farmer's Home Administration *("FmHA")* as an Indispensable Party. (R. 272, 273).

On December 15, 1994, the District Court entered its final judgment in favor of North Alamo, which found, among other things, the actions of San Juan in providing service to the five subdivisions without North Alamo's authorization to be a violation of 7 U.S.C. § 1926(b). The Court's final judgment also enjoined San Juan from pursuing its application to the TNRCC for partial decertification of North Alamo's service area and from offering to provide or providing water service within the five subdivisions. (R.314-315). The judgment was accompanied by a memorandum opinion, prepared pursuant to Fed.R.Civ.P. 52(a). (R. 296-313).

On December 27, 1994, San Juan filed its Motion for New Trial and Motion to Alter or Amend the Judgment. (R. at 321, 325). On December 28, 1994, North Alamo filed its Motion for Leave to Amend Complaint. (R. 330). On January 27, 1995, the Court overruled San Juan's Motion for New Trial and Motion to Alter or Amend the Judgment. North Alamo's Motion for Leave to Amend Complaint was taken under advisement. (R. 344).

On May 11, 1995, the Court in a memorandum order granted, in part, North Alamo's Motion for Leave to Amend Complaint and entered an Amended Final Judgment in favor of North Alamo. (R. at 357, 359). The Amended Final Judgment granted all of the relief set forth in the December 15, 1994 judgment and additionally ordered San Juan to relinquish control of the water distribution infrastructure in the five (5) subdivisions to North Alamo. On May 24, 1995, San Juan filed its First Amended Notice of Appeal. (R. 352-359).

Pursuant to North Alamo's request, the TNRCC on May 30, 1995, issued a Cease and Desist Order commanding San Juan to stop serving customers within North Alamo's CCN area. There was a finding by the TNRCC that the conduct of San Juan in serving the five subdivision area without TNRCC approval was a clear violation of § 13.252 of the Texas Water Code. (San Juan's Appendix "D").

While the District Court's injunction prevented San Juan from asserting its decertification application, the Judgment specifically stated that it did not limit the TNRCC's ability to proceed, on its own volition, with a determination of North Alamo's ability to provide continuous and adequate service in its CCN area. (San Juan's Appendix "E"). Thus, the TNRCC's ability to review, at any time, the sufficiency of North Alamo's service within any part of its CCN area pursuant to the Texas Water Code remains unaffected by the District Court's Judgment.

The District Court's Judgment was appealed to the Court of Appeals, who affirmed it in part and remanded it in part. (San Juan's Appendix "A").

The Court of Appeals declined to consider San Juan's constitutional challenges to the Statute as applied in this case. The Court found that San Juan had failed to raise these issues in the District Court and had sought to raise these issues for the first time on appeal.

San Juan did not raise these constitutional concerns in its Motion to Join FmHA as an Indispensable Party. The brief reference to the Spending Clause in its Supplemental Memorandum in Support of the Motion is limited to San

Juan's argument that the FmHA is an indispensable party by virtue of its interest in protecting federal funds advanced under the congressional spending power. U.S. Const., art. I § 8, cl.1. San Juan's vague reference to and use of the Spending Clause in its argument supporting its Motion to Join the FmHA as a party is not the argument which San Juan now seeks to advance in this appeal. The Court of Appeals further determined that San Juan's challenge to the Statute as an impermissible preemption of State law was rendered moot by the TNRCC's Cease and Desist Order.

San Juan incorrectly states that the TNRCC's jurisdiction over the dispute between North Alamo and San Juan, as triggered by the request for a cease and desist order, was strictly limited to § 13.252 of the Water Code. While San Juan was unable to proceed with its application to decertify, nothing prevented the TNRCC from initiating a review of the adequacy of North Alamo's service to the CCN area and amending or revoking the CCN based on its review.

Moreover, the Court of Appeals was correct in holding that the preemption issue was rendered moot by the action of the TNRCC in granting the Cease and Desist Order against San Juan. As set forth above, San Juan's serving the five subdivision area without TNRCC approval was a violation of Texas law. The TNRCC took appropriate action to stop the violation. Thus, San Juan was precluded not only by the District Court's judgment, but by the TNRCC order from providing service to the affected area and from interfering with North Alamo's CCN rights.

SUMMARY OF THE ARGUMENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

I. San Juan's Petition should be denied because San Juan never properly presented or preserved for appeal its constitutional challenge to the Statute. San Juan only raised the issue for the first time on appeal. Thus, there is no well-developed record upon which this Court could make a reasoned opinion on the constitutional issues advanced by San Juan.

II. San Juan's challenge to the Statute on the basis that it is an improper exercise of the Congress' power under the Spending Clause is irrelevant to the merits of this case since the State of Texas was not a party to this action and no remedy against the State of Texas was sought by North Alamo or granted by the District Court.

III. San Juan's challenge to the Statute on the basis that it is an improper preemption of State law or otherwise "immunizes" North Alamo from the provisions of the Texas Water Code should be rejected because nothing in the District Court's judgment impermissibly alters the administrative scheme under which the State of Texas, though the TNRCC, regulates North Alamo's water services. The judgment leaves unaffected the ability of the TNRCC, on its own volition, to regulate North Alamo.

ARGUMENT

At issue is whether the Court should grant certiorari to review the judgments of the courts below. For the reasons set forth herein, the Court should deny San Juan's Petition because the issues presented for review by San

Juan have not been properly preserved for appeal and are not pertinent to a proper determination of this cause.

I. SAN JUAN'S CONSTITUTIONAL CHALLENGE TO 7 U.S.C. § 1926(b) HAS NOT BEEN PROPERLY PRESERVED FOR APPEAL.

San Juan's constitutional challenge to 7 U.S.C. § 1926(b) was not properly preserved for appeal and North Alamo objects to a granting of San Juan's Petition on that basis.

The Court of Appeals properly declined to consider San Juan's argument that the Act represents an illegitimate exercise of Congress' power under the Spending Clause since San Juan raised the issue for the first time on appeal. The Court of Appeals adhered to its customary rule that it will not consider an issue which is not raised in the trial court and which is raised for the first time on appeal. Thomas v. Capital Sec. Services, 836 F.2d 866, 884 n.25 (5th Cir. 1988). Singleton v. Wulff, 428 U.S. 106, 120 (1976).

San Juan readily admits, throughout its Petition, that it did not raise the constitutional issues explicitly at trial, but attempts to assert that it raised the issue by a reference to the Spending Clause in a Supplemental Memorandum in Support of its Motion to Join FmHA as an Indispensable Party. However, the clause is mentioned in the Memorandum solely in the context of an argument that the FmHA has an interest in the subject of this litigation. At no time in the District Court proceedings did San Juan advance the constitutional arguments which it sought to

advance before the Court of Appeals and which it now advances before the Court.

The Court has repeatedly followed the rule that it should not review claims which are not raised and passed on in the lower courts. Banker's Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988). In determining whether to exercise jurisdiction over questions not properly raised below, the Court has focused on the practical considerations of undertaking such a review, chiefly the Court's need for a properly developed record on appeal. Webb v. Webb, 451 U.S. 493, 500 (1981); See also, Illinois v. Gates, 462 U.S. 213 (1983) ("Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion").

The Court should decline to consider the constitutional issues advanced by San Juan in this case because the issues were not addressed in the District Court and thus there is no well-developed record. Because of the dearth of facts relevant to these issues, little is available to the Court so that it can make a reasoned opinion. Also as set forth below, the constitutional arguments advanced by San Juan are not implicated by the contested facts of this case and the relief granted to North Alamo by the District Court.

II. SAN JUAN'S CHALLENGE OF THE STATUTE AS AN IMPROPER EXERCISE OF CONGRESS' POWER UNDER THE SPENDING CLAUSE IS IMPROPER BECAUSE THE ENFORCEABILITY OF 7 U.S.C. § 1926(b) AGAINST THE STATE OF TEXAS IS NOT AN ISSUE IN THIS CASE.

San Juan urges the Court to review whether the provisions of the Statute are enforceable against the State of Texas under the "conditional spending" test as adopted by the Court in the case of South Dakota v. Dole, 483 U.S. 203 (1987) and as an appropriate exercise of Congress' power under the Spending Clause. However, San Juan's argument is unwarranted as this issue is not properly before the Court. The applicability of 7 U.S.C. § 1926(b) to the State of Texas has never been raised as an issue in this case. North Alamo has not sought to restrain the State of Texas, through the TNRCC, from instituting action against or otherwise regulating North Alamo's water service.

In fact, the District Court carefully emphasized that its ruling does not "prevent the TNRCC from instituting enforcement proceedings on its own to investigate and remedy suspected inadequacies of service....or from otherwise regulating North Alamo." (Memorandum Opinion, December 15, 1994, at 15; San Juan's Appendix "E"). There is nothing raised in either the pleadings or the evidence submitted before the District Court that in any way indicates an interest by the TNRCC in San Juan's application in any capacity other than in its role to arbitrate the disputes between San Juan and North Alamo. There is no portion of the District Court's Judgment which restrains or prohibits the TNRCC from proceeding on its own volition to regulate North Alamo's water service if such

action appears to be necessary. Clearly, the police powers of the TNRCC are not affected.

Throughout its argument, San Juan attempts to equate the restriction on San Juan's ability to seek decertification of North Alamo's service area with a limitation on the State of Texas' authority, by and through the TNRCC, to regulate North Alamo. San Juan's argument is both misleading and without merit.

The issue presented in this case was limited to whether San Juan was precluded by the Act from infringing on North Alamo's certificated area while North Alamo was indebted to the FmHA. Nothing supports the theory that San Juan's application to the TNRCC to decertify North Alamo was an enforcement action to remedy inadequacies in North Alamo's retail water utility service capabilities.

The enforcement of required levels of retail water utility service is vested in the TNRCC, not with municipalities such as San Juan that are competing retail public utilities. It is the TNRCC that has the right to "order any retail public utility that is required by law to possess a certificate of public convenience and necessity to provide specified improvements in its service in a defined area if service in that area is inadequate or substantially inferior to service in a comparable area ...." TEX. WATER CODE ANN. § 13.253(1), (Vernon Supp. 1995).

Where the Texas Legislature has determined that there is a role for local governmental entities to enforce statutory and regulatory schemes entrusted to the State's agencies, the Texas Legislature has expressly so provided. See, e.g., TEX. WATER CODE ANN. Chapter 26, Subchapter E (Vernon 1988 & Supp. 1995); TEX.

HEALTH & SAFETY CODE Chapter 382, Subchapter E (Vernon 1992). However, the Texas Legislature has made no provision for enforcement by municipalities in the administration of TEX. WATER CODE ANN. Chapter 13, or the associated regulations. TEX. WATER CODE ANN. Chapter 13 (Vernon 1988 & Supp. 1995).

In short, Texas law confers no authority on cities such as San Juan to act in any supervisory or enforcement role in ensuring required levels of water utility service. Rather, that function is vested solely and exclusively with the TNRCC. Accordingly, the District Court's order enjoining San Juan from proceeding with its application to decertify North Alamo simply prohibits San Juan from competing with North Alamo for North Alamo's customers, a competition which falls squarely within the prohibition of 7 U.S.C.A. § 1926(b).

Contrary to San Juan's argument otherwise, no compelling state interest is implicated. The TNRCC's statutory enforcement rights to initiate decertification proceedings when retail public utilities fail to provide the statutorily required continuous and adequate service is simply not at issue. The District Court was careful to establish that no enforcement action initiated by the TNRCC, prospective or otherwise, is enjoined by the entry of its injunction against San Juan.

The State of Texas' legitimate interest in insuring certain levels of water utility service is in no manner impacted by the District Court's ruling that San Juan may not serve customers within the area certificated to North Alamo. The scope of the District Court's Judgment is limited solely to the actions of San Juan.

Thus, San Juan's argument that the Statute is not enforceable against the State of Texas under a "conditional spending analysis" or as a proper exercise of Congress' power under the Spending Clause is not applicable or relevant to the merits of this case.

However, even assuming the Court was to engage in a review of the Statute as is urged by San Juan, there is no doubt that the Statute is applicable to the State of Texas. The State of Texas expressly authorized North Alamo, to obtain the federal financing at issue in this case and thus has implicitly bound itself to respect the conditions accompanying such financing. See, TEX. REV. CIV. STAT. ANN. art. 1434(a) (Vernon 1980).

Article 1434(a) provides for the creation of entities, such as North Alamo, and gives authority to such water supply corporations as follows:

> **Contracts with Federal Agencies**
>
> Sec. 2. The said corporation is hereby vested with the power to negotiate and contract with any and all Federal Government agencies including, without exclusion because of enumeration, the Emergency Conservation Acts, Public Works Acts, Self-Liquidating Acts, Housing Unit Acts, Colonization Acts, Conservation Acts, Emergency Relief and Reconstruction Acts, and the Reconstruction Finance Corporation Act of January 22, 1932, Acts of the Seventy-second Congress of the United States of America, First Session, and with others, for the acquisition, construction, and/or maintenance of such

> project and improvements; to obtain money from such Federal Government agency or other sources for the purpose of financing said acquisition, and encumber the properties so acquired or constructed and the income, fees, rents, and other charges thereafter accruing to the said corporation in the operation of said properties; and to evidence the transaction by the issuance of bonds, notes, or warrants to secure the funds so obtained. But it is hereby expressly provided that the bonds, notes and/or warrants so issued shall not constitute general obligation or indebtedness of the said corporation, but shall represent solely a charge upon specifically encumbered properties and the revenue therefrom, as herein provided.

TEX. REV. CIV. STAT. ANN. art. 1434a (Vernon 1980).

In authorizing such action the State of Texas agreed to abide by the provisions of the Statute and has also bound its political subdivisions, including San Juan, to the conditions it accepts. Glenpool Utility Service Authority v. Creek County Rural District No. 2, 861 F.2d 1211 (10th Cir. 1988), cert. denied, 490 U.S. 1067 (1989).

The lower court recognized that 7 U.S.C.A. § 1926(b) "authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities...[by] protecting the territory served by such association against competitive facilities, which might otherwise be developed with the expansion of municipal and other public bodies into an area served by the rural

system." City of Madison, Miss. v. Bear Creek Water Ass'n., 816 F.2d 1057, 1060 (5th Cir. 1987). The Congressional prohibition against municipal encroachment is expressly designed to better secure federal financing for rural water supply systems and thereby effect a federal purpose of extending "to the community [the] benefits of a safe and adequate supply of running household water." Id.

As recognized by the court in Bear Creek, governmental entities, such as the State of Texas and San Juan, derive an economic benefit from the subsidized loans provided by the federal government:

> Equally important, it is likely that FmHA's subsidy to the rural water authority enhanced real estate values and farm prosperity in and around the city and has provided an indirect benefit to the city's overall economic conditions in exchange for the limits on its water service authority. The overall effect of this statute is therefore not so much to infringe the city's sovereign power as to foster a cooperative effort between local and federal authorities. The Tenth Amendment is surely not offended by a limited restriction imposed by the federal government to protect its subsidized loans, particularly when the benefits of those loans accrue to the municipality.

Bear Creek, 816 F.2d 1057, 1059 (5th Cir. 1987).

If the State of Texas was opposed to the provisions of the Statute, it could easily decline the infusion of federal funds to water supply corporations within its boundaries by

amending Art. 1434(a) to prohibit the acceptance of such financing by these state chartered and regulated entities.

As such, the narrow limitations which the Act imposes on San Juan in this case are not a violation of the Spending Clause as argued by San Juan. The limitations on San Juan imposed by the Statute and by the District Court's judgment are limited in scope and time and therefore do not impermissibly affect San Juan's ability to perform its governmental functions in the five subdivision area. The Statute clearly sets forth the mechanism for making the FmHA loans and the conditions that are to accompany them in furtherance of a national policy concerned with water management and rural populations. As such, the Statute is constitutional under the Spending Clause given the State of Texas' explicit authorization to water supply corporations regarding federal financing set forth in Art. 1434(a).

III. 7 U.S.C. § 1926(b) DOES NOT IMMUNIZE NORTH ALAMO FROM § 13.254 AND § 13.255 OF THE TEXAS WATER CODE.

San Juan attempts to argue to the Court that 7 U.S.C. § 1926(b) immunizes North Alamo from the provisions of § 13.254 and § 13.255 of the Texas Water Code and creates a situation where provisions of the Water Code, and the regulations thereto, have been impermissibly preempted. This argument, which is groundless, conveniently overlooks the fact that the express terms of the Statute, which limits certain actions of San Juan, does not affect the police powers of Texas. Moreover, this argument also overlooks the carefully drafted judgment of the District Court which does not impede on the TNRCC's continued ability to regulate North Alamo.

San Juan again attempts to confuse the issues in this case by equating the Statute's prohibitions against the actions of San Juan with what San Juan imagines as a limitation against the State of Texas' authority, by and through the TNRCC, to regulate North Alamo. Contrary to the arguments of San Juan, nothing in the District Court judgment limits the TNRCC's authority to bring an enforcement action against North Alamo under the provisions of the Texas Water Code, or otherwise regulate North Alamo. At no time in this action has North Alamo challenged the authority of the TNRCC to bring an enforcement action against North Alamo. In fact, the District Court's Memorandum Opinion makes clear that the TNRCC has jurisdiction to regulate North Alamo's water service in accordance with Texas law and that nothing in the ruling prevents the TNRCC from instituting enforcement proceedings on its own against North Alamo. (R.296-313). What the Statute prohibits and what the District Court has enjoined are the actions of San Juan in affirmatively seeking to decertify portions of North Alamo's certificated area; conduct which is clearly prohibited by the Statute.

All of the federal courts which have considered the provisions of 7 U.S.C. § 1926(b) have uniformly held that the Statute should be liberally interpreted so as to protect rural water associations indebted to the Farmer's Home Administration from municipal encroachment, whether by granting competing franchises or by annexing areas served by the association. Glenpool Utility Services Authority v. Creek County Rural District No.2, 861 F.2d 1211 (10th Cir.,1988), cert. denied, 490 U.S. 1067 (1989); Bear Creek at 1059 (5th Cir. 1987); Moore Bayou Water Association, Inc. v. Town of Jonestown, 628 F.Supp. 1367 (N.D. Miss. 1986)(applicability of statute not conditioned on finding that encroachment will significantly impair association's

ability to repay FmHA loan); *See also*, Jennings Water, Inc. v. City of North Vernon, Ind., 682 F.Supp. 421, 425 (S.D. Ind. 1988)(statute should be applied broadly to protect rural water associations indebted to FmHA from competition from expanding municipal systems).

Pursuant to the express terms of the Statute and the decisional authority cited above, the water services provided by North Alamo may not be limited by inclusion of a portion of the area served by North Alamo within the boundaries of San Juan or by San Juan's initiating an application for a CCN for similar service within North Alamo's area so long as North Alamo remains indebted to the Farmer's Home Administration. San Juan, through its application to the TNRCC, affirmatively attempted to obtain authorization to provide water service to portions of North Alamo's certificated area in direct violation of the Statute. The District Court's Judgment was narrowly tailored to stop the violation. Its terms applied only to the actions of San Juan.

The Court should accordingly reject the preemption issue propounded by San Juan because preemption is simply not an issue in this case. Nothing in the District Court's Judgment alters the administrative scheme under which the State of Texas, through the TNRCC, regulates North Alamo's water services. What the Statute and the District Court's judgment do prohibit is the type of predatory conduct exemplified by San Juan. (R. 296-313, 358-359). 7 U.S.C § 1926(b).

CONCLUSION

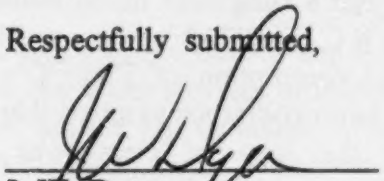
The primary issue presented in this case is the applicability of 7 U.S.C. § 1926(b) to San Juan. However,

San Juan has repeatedly attempted to divert the Court's attention from that issue by raising collateral constitutional and preemption issues which are irrelevant to the merits of this case. San Juan continues to insist that the District Court's Judgment raises issues of the constitutionality of 7 U.S.C. § 1926(b) when applied to the State of Texas and the preemption of TNRCC's regulatory authority. North Alamo continues to stress that the applicability of § 1926(b) to the State of Texas was never an issue in the case. Moreover, the District Court took great care in the drafting of its Judgment to avoid the implications about which San Juan is intent on raising.

The sole issue before the District Court and Court of Appeals was simple, clear and limited: Do the provisions of § 1926(b) prohibit San Juan from encroaching on, or engaging in activities designed to encroach on, North Alamo's service area while North Alamo is indebted to the FmHA? North Alamo has shown that the express terms of the Statute and the cases interpreting the Statute clearly prohibit the actions of San Juan as set forth in the record before the Court. Therefore, the District Court issued an appropriate Judgment. There is no need for the Court to commit its limited resources to engage in an exhaustive review of the constitutional issues presented by San Juan for the reason that there was no issue presented in the lower court which contested the applicability of § 1926(b) to the State of Texas. Moreover, these constitutional issues were raised for the first time on appeal, thereby depriving North Alamo of an opportunity to present evidence on these issues. Thus, this case is not an appropriate case upon which to determine such issues and further does not present the Court with a well developed record upon which to base a decision.

Accordingly, North Alamo respectfully requests that, for the reasons stated above, the Court deny the Petition for Writ of Certiorari filed by the City of San Juan, Texas herein.

Respectfully submitted,



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